









A  
TREATISE  
ON THE  
LAW  
OF  
WILLS AND CODICILS.

---

By WILLIAM ROBERTS  
*OF LINCOLN'S INN, ESQ., BARRISTER AT LAW,*

---

SECOND EDITION,  
MUCH ENLARGED AND IMPROVED.

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IN TWO VOLUMES.

VOL. I.

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1815.



TO  
THE RIGHT HONOURABLE  
**JOHN, LORD ELDON,**

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

*&c. &c. &c.*

MY LORD,

THE terms in which your Lordship has been pleased to express your acceptance of the Dedication of these Volumes, demand my particular acknowledgments.

My acknowledgments, as a member of the profession of the law, are also in an especial manner due to your Lordship, when it is considered that those parts of this Treatise which stand upon the firmest ground of principle and science, are drawn from your Lordship's judgments. Without borrowing largely from that fund, I could never have fulfilled my engagements with the Public ; or, perhaps it would be more correct to say, that if the vast and multifarious mass of former doctrines on the subject of Wills had not been reduced to some elementary consistency by the Cases decided within these last ten years in the Court of Chancery, I could never have ventured upon the undertaking.

# **DEDICATION.**

Under these circumstances a Dedication of the following Work to your Lordship has, I trust, enough in it of propriety to defend it from the imputation of presumption.

It is with the sincerest gratitude, therefore, that I beg to approach your Lordship with this tribute of professional industry, and to request that you will receive it as a testimony of the profound respect with which I am

My Lord,

Your Lordship's much obliged,

And obedient humble Servant,

**WILLIAM ROBERTS.**

*Lincoln's Inn,  
Hilary Vacation, 1815.*

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A  
TREATISE  
ON  
**WILLS AND CODICILS.**

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CHAP. I.  
OF MAKING AND PUBLISHING WILLS.

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SECT. I.

*Progress of the Law.*

**ALIENATIONS** to take effect after death, can only be the practice of an advanced period in the progress of society: after the hand that held and maintained the possession is withdrawn, to permit the will of the proprietor to direct the succession, implies a conception of the sacredness of property, and a state of order and security which does not exist in the beginnings of nations (1). It appears doubtful whether among the Romans, before the introduction of the laws of the Twelve Tables, or among the Athenians before the legislation of Solon, the direct testamentary

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(1) *Omnino rationi naturali repugnat, alicui jus esse statuendi de rebus suis ita, ut voluntas post mortem valere incipiat; ubi jam velle desiit et mors omnia solvit. Hert. Elem. Polit. pars. 2. sect. 11. § 53. Vid. Vinn. Comm. tit. de test. ordin.*

disposition even of moveables was allowed; and among the ancient Germans it appears that the children succeeded to the possessions of the parent, and that he had no power to alienate them by his will. If he had no children, the steps in the order of inheritance and succession were the *patres, patruī, avunculi* (2).

Progress of  
the *testa-  
mentifunctio*,  
in the Ro-  
man juris-  
prudence.

(2) The succession to the heirs of the body, and in case of the defect of such representatives, to the next in proximity of blood, if not a law of nature, seems so to correspond with its dictates, that history hardly carries us back to a time when the notion and admission of this claim did not prevail among mankind. The suggestions of a common feeling appear, therefore, to have made this an universal rule of transmission, and to have established it in communities widely separated by time and place. Thus the representation in the channel of blood and proximity seems to have had its foundation higher than any positive institutions, though to positive institutions we must of course refer to the *modifications* of this rule of succession; which, indeed, has been so variously ordered, that no two nations exactly resemble each other in their institutions regarding it.

That the right of controuling this succession by the private will of the possessor, was the product of an improved period of legislation, there is much concurrent testimony to shew. Till the legislation of Solon, the Athenians did not possess this privilege, as it appears from many authorities, particularly from Plutarch, in his life of Solon, page 196, edit. Bryan, and the orations of Isæus, especially *de Philoctemonis Hereditate*; nor according to Selden *de Success. bon. Hebr. c. 24.* did it exist among the ancient Jews; nor as we learn from Tacitus *de mor. Germ. c. 20,* among the Germans in his day. The tenderness which continued to prevail among the Romans for the legal heir is strongly displayed in their provisions by the laws *Furia, Voconia, and Falcidia*, and more pointedly perhaps by their remedy of *querela inofficiosi testamenti*, wherever a will was made against the order of natural affection, without reasonable cause.

With respect to the question how far the right of disposition by will existed among the Romans, before the laws of the Twelve Tables, there seems to be much variety of opinion. The text of

If the power of disposing of land by will was exercised by our Anglo-Saxon ancestors, it seems much less

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Justinian propounds the order in which the form of the *testamenti factio* proceeded, which the student will consult, with pleasure, in the Commentary of Vinnius, edited, with notes, by Heineccius, in the title *de Testamentis Ordinandis*. It appears that the most ancient mode of making a testament, among the Romans, was, by converting a man's private will into a public law, for such seems to have been the object and intention of the promulgation or celebration of a testament in the *calatis comitiis*, i.e. in the presence of the Roman people summoned before the Sacerdotal College *per curias*. And, according to Heineccius, these assemblies were not convened specially for the purpose of giving sanction to wills, *sed legum ferendarum magistratuumque creandorum causa immo et ob alia negotia publica, bellum, pacem, judicia, &c.*

Thus was this private disposition by testament of the property of an individual promulgated and ratified in the same manner as a public law; and for this reason the *testamenti factio* has, in the text of the imperial law, been said to be *non privati sed publici juris*, *D. 28. c. 3.* and again by Ulpian, it is said, *legatum est, quod legis modo—testamento relinquitur, Ulp. tit. 24. § 1.*

Another form of testament which existed antecedently to the laws of the Twelve Tables, was that called *testamentum procinctum* or *in procinctu*, which was the privilege only of those who were on the eve of going to battle, or *girt* for the war, with the uncertainty on their minds of their ever returning, and was among the immunities in regard to property conferred by the Romans upon the defenders of their country.

But as the *comitia* were held but twice a year, so that a man might be surprised by sickness without having the opportunity of thus solemnizing his last will, and the attendance upon these public assemblies was often difficult or impossible to the aged and infirm; and furthermore, as women were by these forms precluded from making any testaments, as not having any communion with these *comitia*, according to Gellius, lib. 5. c. 19, a third method was struck out; which might facilitate the ultimate disposal of private property to all descriptions of persons, otherwise competent; and this last method was called the *testamentum per as et libram*, which

likely that it originated with themselves, than that they adopted it from those laws which the Roman govern-

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was a fictitious purchase of the family inheritance of heirship, by money weighed in a balance, and tendered by the intended inheritor to the testator, before witnesses.

Thus it is said to be *imago vetusti moris in venditione atque alienatione rerum Mancipi, quæ uno verbo, Mancipatio dicitur, nimirum ut is in quem hæ res transferebantur, eas emeret domino ære et libra, appenso ei ῥομῶν χαλκῶν nummo uno*. And it seems that this fictitious proceeding was still retained after the promulgation of the law of the Twelve Tables had authorized the making of wills by the clause of *paterfam. uti legassit &c. ita jus esto*; for it was still regarded as necessary, to raise the will of a private man to a level with the laws of the state, that it should take the shape of a strict legal transaction *inter vivos*; for *testandi de pecunia sua legibus certis facultas est permissa, non autem juris dictionis mutare formam, vel juri publico derogare cuiquam permissum est*. C. 6. 23. 13. The two former methods, by the *testamentum in procinctu*, and *calatis comitiis*, were thrown into total disuse, by the *testamentum per æs et libram*; but this last form of willing again made way for others of a more convenient description.

The methods above-mentioned were referrible to the *jus civile*, or as we express it, the law of the land; but from the edict of the prætor, other forms at length were brought into practice, by virtue of which *jus honorarium*, the *mancipatio*, and the weighing and delivering of money, were dispensed with, and, in their stead, the solemnity of *signing* by seven witnesses, was introduced: the *presence* only and not the *signature* of witnesses being necessary by the *jus civile*.

At length, however, by gradual use and progressive alterations, as the text of Justinian informs us, the *lex prætoria* and the *jus civile* were in some degree incorporated; and a compounded regulation took place, whereby it became requisite to the valid constitution of a will, that the witnesses should be present (the presence of witnesses being the rule of the *jus civile*);\* that they and also the testator should sign, according to the superadded institution of positive law; and lastly, that in virtue of the prætorian edict, their seals should be affixed, and that the number of witnesses should be seven.

ment had established and left standing in this country. It appears, however, pretty certain, that this testamentary power over land did not survive the Norman conquest, except in particular cities and boroughs, where, by particular favour, the Saxon institutions were suffered to breathe (3): it ceased by the operation of the feudal system of property, which necessarily excluded all voluntary alienations of possessions

Afterwards, the further solemnity of naming the heir in the testament was added by Justinian, and again taken away by the same emperor, in Nov. 119. c. 9. and at length, the excess of testimony was corrected by the canon law in the pontificate of Alexander the Third, by which it was declared sufficient to prove a testament by two or three witnesses, the parochial minister being added; *improbata constitutione juris civilis de septem testibus adhibendis ut nimis longe recedente ab eo quod scriptum est—in ore duorum vel trium testium stet omne verbum*, Swinb. 64. Deut. c. 18. Matth. c. 18. which reformation obtained the sanction of general usage.

Swinburn says, that this institution has also been reformed by the general custom of this realm, “which distinctly requires no more than two witnesses, so they be free from any just cause of exception;” which observation he repeats in several places of his treatise on wills, on the authority of Linwood, in *Statut. Verb. Prob. de Test. l. 3. Provincial Constit. Cant.* Bracton also has the following passage: “*Fieri autem debet testamentum liberi hominis ad minus coram duobus vel pluribus viris legalibus et honestis, clericis vel laicis ad hoc specialiter convocatis, ad probandum testamentum defuncti si opus fuerit, si de testamento dubitatur.*” Bract. lib. 32. fol. 61. but these words import a recommendation, and not an imperative rule; and nothing seems now to be better understood, than that a will of personality needs neither the attestation of witnesses, or the testator’s seal or signature; and though written in another hand, yet if proved to have been written according to the testator’s instructions, and approved by him, it is a good will to dispose of chattels. Comyns, 452, et seq.

(3) Whether gavelkind lands in Kent were deviseable by custom seems to be a matter in dispute. See the arguments *pro et con.* in Rob. Gavel. 235.

with which personal services and duties were inseparably connected<sup>a</sup>. But with respect to moveables, the testamentary power seems, in this country, with more or less restraint, to have been exerciseable in a very remote period. The ready mode of authenticating the property in goods by the possession, and of transferring the possession by manual delivery, and the usufructuary and revocable quality of terms of years, caused them at an early period to be considered as proper subjects for every kind of alienation. But though testaments of moveables were permitted by the ancient law of England, according to Glanville and Bracton, yet the power extended only to one-third, called the dead man's part; which limitation seemed to prevail in London and York, after it had fallen into disuse in other parts of the kingdom, till at length by several statutes the testamentary power over goods was thrown generally open (4).

<sup>a</sup> Vide 1 Eq. Ca. Abr. 401.

Restraints upon the testamentary power by the customs of York and London, removed by statutes.

(4) By the 4th W. and M. c. 2. persons within the province of York may dispose by will of all their personal estate, in as large and ample a manner as within the province of Canterbury, and elsewhere; and the widows and children, and other kindred of such testator, are barred of their claims under the custom. But the citizens of the cities of York and Chester, who were freemen, inhabiting there, being excepted out of this statute, the 2d and 3d Anne, c. 5, was made to repeal this exception, and to put them upon the same footing, in this respect, as persons within the province of York. And by the 11th G. 1. c. 18, the citizens and freemen of the city of London are also enabled to devise and dispose of their personal estate, in such manner as they shall think fit, except where they enter into any agreement on marriage, or otherwise, that their personal property shall be subject to or distributed by the custom. In cases of intestacy, the property becomes subject to, and distributable according to the custom.

**SECT. 1.**      *Progress of the Law.*

According to the author of the Commentaries, “ by the ancient common law of the land, and which continued at the time of Magna Charta, a man’s goods were to be divided into three parts, of which one went to his heirs, or lineal descendants, another to his wife, and the third was at his own disposal ; or if he died without a wife, he might dispose of one moiety, and the other went to his children. If he had no children, the wife was entitled to one moiety, and he might bequeath the other ; but if he died without wife, or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts, and the writ *de rationabili parte bonorum*, was given to recover them.

In the reign of Edward the Third, this right of the wife and children was still held to be the common law, though frequently pleaded as the local custom of Berks, Devon, and other counties ; and Sir Henry Finch lays it down expressly to be the general law of the land, in the reign of Charles the First. But the law has since been altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels, though it would be difficult to trace out when this alteration began<sup>b</sup>.” (5)

<sup>b</sup> 2 Bl. Com. 491. 2.

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(5) This difference in importance between land and goods arose out of the principles of the feudal system. According to the law of Rome, no such difference subsisted. The general representative was the heir, and by that title he succeeded as well to the moveables as immoveables. And when the *whole* substance devolved, the difference was only between him who was appointed heir by

Of the power of bequeathing legacies in the different stages of the Roman law.



With respect to land, the feudal system was long in giving way to the increasing propensity of indivi-

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the will, and was called the *hæres institutus*\*, and him who succeeded to the intestate as his natural heir. It has been endeavoured, in a preceding note, to help the student to understand the nature of this appointment of an heir, by will, in the law of Rome, before and after the law of the Twelve Tables, by the clause "*uti quisque legassit, &c.*" (which was construed to comprise the *hæredum institutiones*, as well as the *legata*) confirmed the general testamentary power. A slight summary of the practice and forms of bestowing particular parts of a man's possessions by way of legacy, under the different stages of the Roman law, may perhaps be not unacceptable.

The *legata et fidei-commissa* were the two modes whereby the testamentary disposition of property in *particular* things was effected; in contradistinction to a gift of the universal inheritance or substance of the testator; in the disposal whereof, and in the institution or appointment of the universal heir, consisted properly the *testamenti factio*.

Another very important distinction between the *hæreditas ex testamento* and the *legatum* was this—that the latter was purely lucrative, whereas the former was often burthened with obligations, and sometimes to such an extent as to be thereby rendered unprofitable. By the text of the imperial law, the legacy or *legatum* was defined to be "*donatio quædam a defuncto relicta, ab hærede præstanda*," and great stress was laid by the commentators on the word '*quædam*,' as importing something having the quality of a gift in *some* respects, and yet essentially differing from it in *others*. A gift they said it could not be, because a gift was properly a transaction between two persons, and requiring for its perfection the acceptance of the donee.

A legacy did not depend upon the acceptance of the legatee, nor was it a transaction between two persons; it was the creature of the testator's will only, ambulatory and suspended during his life.

\* If of the goods only, he was called *hæres testamentarius*; and it was shewed by Lord Hardwicke that *executor* was a barbarous term unknown to the civil law. 3 Atk. 300

duals to make provisions that were to take place after death. It seems, however, that with the consent of

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In a strict sense, indeed, it was considered as expecting the acceptance or assumption of the inheritance by the heir, with the function belonging to it; *post mortem testatoris adhuc pendet ab additione hæreditatis*. And yet it was *quædam donatio*, as proceeding from the benevolence of the testator, and conferring a title of emolument only—*titulus, mere lucrativus*. The latter words of the definition ‘*ab hærede præstanda*.’ are to be understood as implying, that, although the *property* in the thing bequeathed passes directly to the legatee, the *possession* was nevertheless to be looked for at the hands of the heir.

We learn from Justinian’s Institutes, *tit. de legatis*, what were the ancient methods and forms of bequeathing, which, by their strictness and technicality imposed great difficulties upon, and sometimes disappointed the wishes of, the testator. These various forms gave a diversity of rights and remedies to the legatary, and were of unequal efficacy in respect to the disposing power of the testator: as for example, by one form a testator could dispose only of what was already his own property, by another, he could dispose of the possessions of other men, provided they were saleable, as far as his assets in the hands of the heir would suffice for the purchase: some gave a right of action in *rem*, and some in *personam*. These and other particulars respecting them, the reader will find well explained in the Commentary of Vinnius, *tit. de legatis*. The enquiry is, however, only a matter of curiosity, as Justinian, by a sensible law, reduced these various forms to one and the same operation.

But as the general strictness belonging to them all still remained, though the intricacy of distinction between them was removed, the same Emperor, by a stroke of liberal policy, levelled the distinction in point of *effect*, between the *legata* and the *fidei-commissa*, and thereby, the rigid forms of expression, the necessity of the previous appointment of an heir, the testator’s inability to extend the benefit beyond the life of the heir, or to bequeath it by an instrument less solemn than a regular testament, or codicil confirmed by a testament, were all removed, and the same indulgence given to the bequest by way of *direct legacy*, as to that which was effected through the medium of a *trust*.

the superior, the feudatory often contrived to alienate by a donation by deed, made on the bed of death,

In virtue of this ordinance, and in prosecution of its spirit, a more liberal interpretation obtained in the construction of testaments, in which from thenceforward the intention of the testator was the principal object of enquiry, and a numerous description of persons whom the rigour of the *jus civilis* had deemed incapable of taking by way of *legacy*, such as the banished, the childless, persons living in celibacy, and strangers, were rendered capable of taking by will, and the circuitry and precariousness of a trust were avoided; and, on the other hand, to equalize the advantages respectively belonging to the *legatus* and the *fidei-commissa*, instead of the extraordinary and sometimes dilatory process by which the *fidei-commissa* were enforced, the ordinary remedy by the *actio ex testamento*, and even the *rei vindictio*, in the cases where it applied, were opened to all descriptions of legataries.

Of the *donatio causâ mortis*.

The *donatio causâ mortis* is a title of the civil law, and of our own, to which the attention of the diligent student should be directed. In the text of the Institutes of Justinian, lib. 7, it is thus defined, or rather described; *Mortis causâ donatio est, quæ propter mortis fit suspicionem quum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accipit: sin autem super vixisset is qui donavit, reciperet: vel si cum donationis pœnituisse, aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia. Nam cum precedentibus ambiguum fuerat, utrum donationis, an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legis connumeretur, et sic procedat, quem ad modum nostra constitutio eam formavit. Et in summâ mortis causâ donatio est, quum magis se quis velit habere, quam cum, cui donat, magisque eum, cui donat, quam hæredem suum: which description the Emperor illustrates by an example from the Odyssey, of the gift of Telemachus to Piræus. (See also other examples of the antiquity of this species of gift in Taylor's Elements of the Civil Law, p. 536-7.)*

According to Vinnius, in his Commentaries on this description of the *donatio causâ mortis*, it is not necessary to the constitution thereof, that the giver should be in actual and imminent danger of death, but it is enough if he be moved by the general consideration of

*mortis causa* ; which, being a gift to take effect in point of form, *de presenti*, though its real effect

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mortality, *sola cogitatione mortalitatis ex sorte humana*, provided he expressly declares at the time, that he gives with such expectation and intention, otherwise the gift will be construed a pure and simple *donatio inter vivos*, and, consequently, will not be revocable. The same account of it is given by Swinburn, in the seventh section of his Treatise on Testaments and Wills. But in our courts of equity, the description of this species of donation has been confined within narrower bounds, being limited to those cases where a man lying in extremity, or being surprised with sickness, and having no opportunity to make his will, lest he should die before he can make it, gives with his own hands, his goods to his friends about him. This, says Lord Cowper, if he dies, shall operate as a legacy, but if he recovers, then the property thereof reverts to him." See Gilb. Eq. Rep. 12, 13. Prec. in Chan. 269 ; and see 3 P. Wms. 358. 1 P. Wms. 405. 442. 1 Vez. jun. 547. The reader, however, will find in *Still v. Chapman*, 2 Bro. C. R. 612. a decision of Lord Thurlow on this subject, conformable to the explanation given in Vinnius and Swinburn, as above-mentioned.

It appears quite clear, according to all the authorities, that there must be a delivery of the thing by the giver in his lifetime ; and we observe, that Lord Cowper's expression, in the case of *Hedges v. Hedges*, Prec. in Chan. 269, was "gives with his own hands." And, by Lord Hardwicke, in the case of *Shargold v. Shargold*, 2 Vez. 431, it was said, that the delivery must be *actual*, and that a *symbolical* delivery would not do ; for which reason his Lordship held, that a delivery of receipts for S. S. Ann. made in the donor's last illness, and expressly in contemplation of death, was not a good *donatio mortis causá* ; consequently, said his Lordship, this was merely legatory, and amounted to a nuncupative will, and was contrary to the statute of frauds ; for if the necessity for delivery be taken from the thing, it remained merely nuncupative.

Upon the same ground, his Lordship held that it was impossible to make a donation *mortis causá* of stock or annuities, because in their nature they were not capable of *actual* delivery ; and that, therefore, there could not be a gift *causá mortis* of them, without a

was postponed to the death of the grantor, might introduce this ambiguous kind of *testamenti factio*, with

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*transfer*, or something amounting to a transfer. And upon the same principle it was judged, in *Miller v. Miller*, 3 P. Wms. 356, that a note for 100l. being merely a chose in action, could not be the subject of a *donatio causâ mortis*.

But still, perhaps, if such a delivery be made as, in gifts *inter vivos*, would actually transfer the property in the thing, and give the possession in law, this will be a sufficient delivery to support the act as a *donatio mortis causâ*; for the nature of the thing must be respected in all transfers. Thus in the case above cited, of the gift of the receipts for S.S. Ann. it seemed to be admitted by the Chancellor, that the *transfer* of the stock itself would have been effectual. And, perhaps, Lord Hardwicke designed in the case above cited to deny the efficacy of a *symbolical* delivery only where the thing was susceptible of a *specific* and *manual* delivery. The decision of *Lawson v. Lawson*, 1 P. Wms. 441, wherein a man upon his death-bed had drawn a bill upon a goldsmith, to pay 100l. to A's wife to buy mourning, is an instance of an effectual appointment *in the nature of a donatio mortis causâ*; and see *Tate v. Hilbert*, 2 Vez. jun. 111, wherein that decision was approved by Lord Loughborough; his Lordship, at the same time observing, that the report in 2 P. Wms. was incorrect, as it appeared from the Register's book that the direction for mourning was indorsed upon the bill, in the donor's hand-writing. It will be seen also by the cases of *Still v. Chapman*, 2 Bro. C.R. 612, and *Snellgrove v. Bailey*, 3 Atk. 214, that both bank notes and even bonds have been held to be capable of a sufficient delivery to constitute a good *donatio causâ mortis*.

The principal circumstances which distinguish the *donatio mortis causâ* from the *proper legacy*, should be attended to. The points also of resemblance should be carefully marked. And principally, on this head, the ambulatory, imperfect, and revocable nature of both will occur as the most important article in which they agree; and on the other hand, the principal difference between them, seems to consist in the independence of the title of the donee of the gift *causâ mortis*, on the act or consent of the representative. The same grounds of difference distinguished them in the civil law,

less novelty of principle\*. It seems, indeed, that the consent of the heir was, at first, and for a long continuance, thought necessary to these alienations by deed, in prospect of death; though, according to some writers, this practice was worn out before the statutes of Henry the Eighth<sup>d</sup>. It seems, that soon after the statute of *quia emptores* had concurred with other causes, to render the testamentary power over land as well as moveables an object of universal desire, the

\* Glanv. lib. 7. c. 1.

<sup>d</sup> See Dal. on Feuds, c. 3. sect. 1, and Spellman's Remains; also Glanv. l. 7. c. 1.

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*donatio hæc ab additione hæreditatis, sicut legatum non pendet, sed sola morte confirmatur donantis.* It should be observed also, that a *donatio causâ mortis* differs from a legacy in its exemption from the jurisdiction of the ecclesiastical courts, 2 Vez. 437; and again resembles it in its liability to debts upon a deficiency of assets; see *Smith v. Cason*, at the end of *Drury v. Smith*, 1 P. Wms. 406. It is liable to the duties on legacies, imposed by the late acts of parliament; and with the Romans it fell under the restraints of the *lex Falcidia* as well as legacies. They are both liable, according to our laws, to be defeated by creditors.

Finally it may be observed, that the fact of the gift *mortis causâ* is, in our law, to be proved in the same manner as other facts are to be proved; whereas, in the law of the empire, it was a point of resemblance between this gift and a legacy, that the former was necessary to be proved by five witnesses; which was the number necessary to the proof of a codicil, or any instrument of a testamentary operation which was not in strictness a testament according to its definition in the civil law.

If the gift be made and authenticated by a written instrument, without any actual delivery, but the deed or instrument conveys an interest to take effect absolutely in possession at the decease of the donor, this cannot be effectuated as a *donatio causâ mortis*, but there seems to be no reason why it should not operate as a testamentary disposition.

difficulty arising from the necessity of livery of seisin was eluded, by the practice of making feoffments to uses, over which, by the assistance of the courts of equity, wherein declarations and dispositions in respect to those uses were carried into effect, if made upon good consideration, a power of disposing by will might be exercised. And if these creations of uses were adopted from the civil law, we may conjecture that our ancestors were led more easily into the practice, by the notions they had previously learned to entertain of a distinction between the legal and beneficial property, from their reservations of the *dominium directum*, abstracted from the *dominium utile*, in their first feudal donations.

It is well known, however, that by the statute 27 H. 8. c. 10. this method of virtually disposing of land by will was disturbed. For by that statute, the use, as soon as it was created, became the *legal* estate, which was immediately carried to and executed in the *cestui que use*, so that wills lost their operation on the use raised directly upon a feoffment. It was still, however, in the power of individuals to elude the statute, and to keep the legal separate from the beneficial interest, by means of an use raised upon an use, or a second use, which the courts construed to be out of the reach and operation of the act, and thus transferred them to the jurisdiction of equity, under the denomination of trusts. In a very few years afterwards, however, an end was in a great measure put to these artifices, by the statutes of 32 Hen. 8. c. 1. and 34 Hen. 8. c. 5. usually called the statutes of wills.

By these statutes, all persons having any manors, lands, tenements, or hereditaments, in possession, re-

version, or remainder, holden by socage tenure, or in the nature of socage tenure, and having no lands held *in capite*, or by knight's service, were enabled to devise all their lands, or any rents, commons, or profits, out of them, to any person, in fee simple, fee tail, for life, or for years, at their pleasure. Those holding of the king *in capite* by knight's service, or by knight's service and not in chief, or of any common person by knight's service, might devise two parts thereof in three, and no more; the other third part being to descend to the heir, for satisfying the duties of the tenure, and, therefore, the devise of the whole land in such a case would be void. The person holding any such land by knight's service *in capite*, and other lands by socage tenure, might devise two parts of the whole, and no more, or any rent, &c. out of it, at his pleasure. He that held lands of the king by knight's service only, and not *in capite*, as if a mesne lord by knight's service had also other lands held by socage tenure, might devise two parts in three of all the land held by knight's service, or any rent, &c. out of it, and all his socage lands at pleasure. But which disposing power was only to be exercised by a will or testament committed to *writing*, in the *life-time* of the testator.

By the conversion of military tenures into common socage, the statute 12 Car. 2. 24, brought the greatest portion of the lands of this kingdom within the above-mentioned statutes of Hen 8. and made them disposable by the last wills of such as possessed them in fee simple. By this statute, which, as the title declares, was "for taking away the court of wards and liveries, and tenures *in capite*, and by knight's service, and purveyance, and for settling a revenue upon his ma-



jesty in lieu thereof," all tenures by knight's service of the king, or of any other person, and by knight's service *in capite*, and by socage *in capite* of the king, and the fruits and consequents thereof, are taken away and converted into free and common socage: and it is thereby enacted, that all tenures thereafter to be created by the king, his heirs or successors, upon any grants of any manors, lands, or hereditaments, of any estate of inheritance, at the common law, shall be free and common socage, and not by knight's service, or *in capite*.

But the tenure by copy of court roll, and the services incident to the same, are untouched by this act of Charles 2. nor do the statutes of Hen. 8. above-mentioned extend to them, as they do not come within the description of socage tenure. The tenure in frankalmoign, and the honorary services of grand serjeants, other than of wardship, marriage, and the charges incident to the tenure by knight's service, were likewise unaffected by this act of Charles\*.

The loose construction of the statutes of wills.

It appears, however, that there was something to regret in the almost boundless facility which was given to the testamentary power, by the operation of these statutes; in so much that a celebrated writer has remarked, in speaking of the operation of the statute

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\* This Act made some alterations also in socage tenure. It took away the aids *pur file marier*, and *pur faire fitz chevalier*, which were incident to *all* socage tenures. And it relieved socage *in capite* from the burthen of the King's primer seizin, and fines of alienation to the King, to both of which socage *in capite* was equally liable with tenure by Knight's service. See Harg. Co. Litt. 93. c. (3).

of wills, that experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law, which are so nicely constructed, and so artificially connected together, that the least breach in any one of them, disorders, for a time, the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person, were allowed to be good wills within the statute.

It appears by the cases upon this statute, that the testament of lands and tenements ought not only to be in writing, but that it must be committed to writing at the time of making thereof, or at least in the lifetime of the testator; and that it is not sufficient to put it into writing, after the testator's death. But if the will be made by parol, and is afterwards written, and then carried to the testator for his approbation, and he approves of it, it is a good will of lands, under the statutes of Henry the Eighth; and it has been held, that if the testator, when he declared his will by word of mouth, had ordered the same to be written, and the will was accordingly written in his lifetime, the testament was as good as if it had been written at first. But, if a man were on his death-bed, and another came to him, and asked him whether his wife should have his land, to which he answered, yes, and a clerk being present did put this into writing, without any precedent command, or subsequent allowance of the sick person, this was not a good testament of land, according to the exigency of the statute of wills; and if a man declared his will before wit-

nesses, and sent for a notary to write it, and died before he came, and then it was written, this was no good will of lands, though it would have been sufficient, at that time, as a nuncupative will of chattels.

But if a notary took direction from a sick person for his will, and afterwards went away and wrote it, and then brought it again, and read it to the testator, who approved of it, or if it were written from his mouth by the notary, by the direction of the testator himself, although it were not shewn or read to him afterwards, these were held to be valid dispositions of land, under the statutes of Hen. 8. And further, it has been held upon these statutes, that if a notary did only take rude notes or directions from a sick man, which he did agree to, and they were afterwards written fair in his life-time, and not shewn to him again, or not written fair till after his death, this was an effectual will to dispose of lands\*.

In the case of *Laurence v. Kete*<sup>†</sup>, we have the sentiments of the judges much at large, respecting the sufficiency of a will under these statutes. A. being sick, said that he had devised all his lands to his wife, for life, and limited several remainders of several parcels of them, and about an hour afterwards expressed a wish that one K. were there to write his will, whereupon the wife, without acquainting her husband with it, sent for K. who, from the mouth of the witnesses who heard the devise, wrote the same; but because they differed in their testimony, touching the limitations of the remainders, he wrote two wills, and this without the privity of the husband, who, before the

\* *Perk. sect. 476, 477. Dyer, 53. 72. Plowd: 345. 4 Rep. 60.*

<sup>†</sup> *Alleyne Rep. 54.*

writing was finished, became senseless, and presently afterwards died.

And thereupon the following points were agreed to by the court, and given in charge to the jury: 1st, That an actual devise by word, is no sufficient ground for a stranger to write the will, but there ought to be an actual desire expressed to have the will written; nor is a bare wishing sufficient; there should be an actual willing. 2. That this desire ought to be expressed in some short space of time after the devise, so that it may be regarded as one continual act; for if the devise be made at one time, and at another time the deviser sends for a person to write his will, a new declaration will be necessary to make it effectual. 3. That an actual desire of the husband that K. were there to write his will, was a sufficient ground for the wife to send for him, though the deviser gave no express directions to do it. 4. That the writing the will from the mouth of witnesses was sufficient, and it need not be from the mouth of the testator. 5. If witnesses agree as to the devise for life, the will stands good for that, though they disagree as to the limitation of the remainders. 6. Though the deviser becomes senseless before the will be written, yet, if it be written before he dies, it is a good will in writing. 7. If a will continue in writing at the time of the death of the testator, though it be lost or burned afterwards, it stands good; but if it be burned at the time of his death, then the devise is void. The next day the jury gave a verdict against the will, because the evidence was not clear as to the testator's desire to send for K. There was a motion for a new trial, upon pretence of partiality in some of the jurors, but the motion did not succeed.

The case of *Stephens v. Gerrard*<sup>†</sup>, has been said to have given rise to the clause respecting the signature and attestation of wills in the statute of frauds. Some loose sheets of paper were there produced as the will of Sir Edward Worsley, and a title was set up under them in favour of his natural daughter: they were written by one Baynham, an attorney of Gray's Inn. Sir Edward had not signed them, and there was no evidence offered to prove them published, but that of Baynham; whose evidence, according to Siderfin, made it appear, that Sir Edward had dictated a writing made by him, and had caused it to be interlined, and had said that he intended to write it over again himself, but that in the mean time what was written should be his will, though he refused at that time to sign and publish it as such; and the conclusion of it as it stood was as follows, "in witness whereof I have put my hand and seal to every sheet," but in fact his hand and seal were not put to any one sheet; the court, nevertheless, held this to be a sufficient will, and so the jury found it.

These loose constructions of the statute of wills called for the formal restraints imposed by the 5th and 6th sections of the statute of frauds.

These loose constructions of the statute of wills, which afforded such facilities to designing persons of practising upon the weakness of men on the bed of sickness, or of forging testaments and supporting them by perjury, when the lips of the party were closed for ever, induced the legislature to interpose some additional guards for the protection of these last and most interesting dispositions of property. By the statute of 29 Car. 2. c. 3. it was, therefore, enacted, that "all devises and bequests of any lands or tenements, deviseable either by force of the statute of wills, or by that statute or by force of the custom of Kent,

<sup>†</sup> Sid. 315. 2 Keb. 128.

or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

It is considered by Swinburn among the advantages of a *written* testament, that the testator has thereby an opportunity of concealing the contents from the witnesses, which he cannot do when he makes a *nuncupative* testament. For, says he, (after enumerating many of the motives which may rationally influence the testator to keep those in expectancy ignorant of his last dispositions,) in these and the like cases, after the testator has written his will with his own hand, or procured some other to write the same, he may close up the writing without making the witnesses privy to the contents thereof; and shewing the same to the witnesses, he may say unto them, *This is my last will and testament, or herein is contained my last will*, and this is sufficient.

It was an advantage of the written will that the contents might be concealed from the witnesses.

Now, continues he, is the instrument the less available, because the witnesses do not know what is contained in the same, in case the witnesses be able to prove the identity of the writing; that is to say, that the will produced, is the very same writing which the testator in his life-time affirmed before them, to be his will: otherwise, the will can have no effect through defect of sufficient proof. The same writer, therefore, recommends, lest the will should fail for want of sufficient proof, when the testator would not have the contents known, that the witnesses should write their

names on the back, or on some part of the testament, or use some other means that might enable them to depose and testify undoubtingly, that the same is the very writing itself, which the testator affirmed to be his will<sup>b</sup>.

This advantage exists equally under the statute of Charles.

What Swinburn here recommends in practice, became soon afterwards the law of the land, by the wise enactments of the statute of 29 Car. II. which, while it gave to the declaration of a man's last will the solemn notoriety of a triple attestation, preserved to testators all the advantages of the written form; for though by the statute of Charles, the three witnesses must sign in the presence of the testator, it is no more necessary for them than for the witnesses who were voluntarily called in by a testator to attest the instrument in writing, under the statute of Henry the Eighth, to be privy to the contents of the instrument.

In *Peate v. Ougley*<sup>1</sup>, which was after the statute of Charles, a testator produced to the witnesses a paper folded up, and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or express what it was: but it was all written with the testator's own hand. It was objected, that this was not a good execution of the will within the statute; for that it was not enough that the witnesses wrote their names, they ought to attest the signing by the testator, or at least the publication of the will; but that the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other side it was insisted,

<sup>b</sup> Swinb. on Test. part. 1. sect. 11. God. O. L. 66.

<sup>1</sup> Com. 197.

that the execution was sufficient within the statute ; for that there was no necessity for the witnesses to see the testator write his name ; and, if he wrote these words, *signed, sealed, and published* as his will, and desired the witnesses to subscribe their names to that, it was a sufficient publication of his will, though the witnesses did not hear him *declare it to be his will*. And Trevor J. inclined, that there was sufficient evidence of the execution.

But the case of *Trimmer v. Jackson* <sup>\*</sup> went further, for there the witnesses were so far removed from a knowledge of the *contents*, that they were actually deceived as to the *nature* and *purpose* of the instrument, which they were led to believe, from the words used by the testator at the time of the execution, was a deed and not a will. It was delivered as his act and deed ; and the words 'sealed and delivered' were put above the place where the witnesses were to subscribe their names ; and in consideration, as it is said, of the inconvenience that was possible to arise in families from its being known that a person had made his will, it was adjudged by the court, that this was a sufficient execution.

According to these cases it not only appears to have been the opinion of the courts, that it was unnecessary that the witnesses should be privy to the contents of the will since the statute of Charles, (as it certainly appears to have been held upon the statute of Henry the Eighth,) but they seem to have carried the allowance beyond the cases, (loose as they appear to have been,) which were determined upon the statute of

<sup>\*</sup> Cited by Denison J. in *Wallis v. Wallis*, 4 Burn. Eccl. L. 127.



wills ; for, as we learn from Swinburn, the authorities go no further than to shew, that one of the advantages of the written testament over the nuncupative method, (which was still permitted, where, by the customs of particular places, lands were devisable) was the opportunity it gave to the testator to make an effectual will, without disclosing the contents even to the witnesses, which was a concealment oftentimes of importance to the peace of families ; but then the identity of the will ought to be proved : and therefore, it seems to have been a common idea with the writers upon the subject of wills previous to the statute 29 Car. 2., that the nature of the instrument or writing ought to be announced or published by the testator to the parties present.

A reliance upon the security derived from the attestation by three credible witnesses in the presence of the testator, may account for the little importance attributed by some of the judges to the publication of the will by the testator ; so little indeed, as to deem it unnecessary for him to announce or declare to the witnesses the nature of the instrument they were to sign.

In the case of *Wallis v. Wallis*<sup>1</sup>, wherein both *Trimmer v. Jackson*, and *Peate v. Ougley* were cited, there seems to have been some doubt on the subject of publication. The case, however, though argued only at the assizes, shews the opinion of Mr. Justice Denison, as to the necessity for the witnesses to know what instrument they were signing, to be in correspondence with that of Lord Mansfield, and

<sup>1</sup> 4 Burn. Eccl. L. 127.

the judges who decided the case of *Trimmer v. Jackson*\*,

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## SECTION II.

### *Testamentary Capacity.*

The Statute 34 & 35 Hen. VIII which explains the power of devising lands, excludes from the exercise of it all infants, idiots, femmes covert, and persons of nonsane memory. There has been some diversity of opinion concerning the age at which the testamentary capacity, as to personal estate, takes place; but the doctrine that it commences in males at 14, and in females at 12, seems to be most relied on<sup>m</sup>. Of lands no person can make a will till 21, by the words of the statute of wills, unless by the special custom of particular places<sup>n</sup>. And it seems that no custom can enable a male infant to make *any* will before he is 14 years of age<sup>o</sup>.

*Of the age at which it takes place.*

A woman whose husband is banished for life may make a Will and act in every respect as a feme sole.<sup>p</sup>

But regularly, a woman under coverture cannot make a will, either of lands or goods, not even of her

*Capacity of married women.*

\* But observe what was said by Lord Hardwicke as to the necessity for publication. 3 Atk. 161, *Ross v. Ewer*.

A will may be written on any material, or in any language, so as, if it concern property in England, it be framed with the solemnities required by the English law. Swinb. p. 4. S. 28. 1 Vern. 85.

<sup>m</sup> Harg. Co. Litt. 89. b.

<sup>n</sup> Godolph. Orph. Leg. 21.

<sup>o</sup> Law of Ex. 153.

<sup>p</sup> 2 Vern. 104.

paraphernalia<sup>a</sup>; though these last become absolutely her's upon her husband's death, and in the mean time they are not subject to his disposition by will.<sup>r</sup> He may however sell or give them away in his life time; and if he leaves an insufficiency of assets they will be subject to the payment of his debts.<sup>s</sup> It has nevertheless been decided that if the husband pawn the wife's paraphernalia and die leaving a fund sufficient to pay all his debts and to redeem the pledges, she is entitled to have them redeemed out of his personal estate<sup>t</sup>. With the licence and consent of the husband a wife may make testament of her own, and it is said, even of the husband's goods<sup>u</sup>; but he may revoke the same, not only during her life, but, according to Swinburn, after her death, before the will is proved. If, however, he confirm it after her death, he can never afterwards depart from it. But that such an instrument is entitled to be called, in strictness, a will, has been doubted and denied<sup>v</sup>. And without such consent of the husband, the wife has no legal power of making any testamentary disposition of her *own* property, not even of her debts and choses in action, which are not divested out of her by the marriage, and do not survive to the husband. But she may make her husband her executor, and if she do not, and die in his life-time, he is entitled to possess himself of her choses in action, as her administrator.

In equity, however, effect is frequently given to the testamentary dispositions of a wife, as where the husband stipulates that certain personal property shall

<sup>a</sup> viz. her bed, wearing apparel, and ornaments of her person if suitable to her husband's state and quality.

<sup>r</sup> 3 Atk. 394.

<sup>s</sup> 1. P. Wms. 730.

<sup>t</sup> 3 Atk. 395.

<sup>u</sup> Swinb. 89.

<sup>v</sup> 2 Atk. 49.

be enjoyed by the wife separately, it shall be enjoyed by her with all its incidents, whereof the *jus disponendi* is one \*. And where she has this power over the principal, she must necessarily also have it over its produce and accretions †.

Of the Goods and Chattels which she has as Executrix to another she may make an executor without her husband's consent ‡ ; but of such she can make no devise with or without her husband's leave, for they are not deviseable.

Where she makes a will in execution of a power, though this is not in strictness a will, yet it is an act of a testamentary nature, and must be proved in the Spiritual Court, or the legatee cannot entitle himself in a court of law ; and the course is not to give probate of the will, but administration with the will annexed, as a testamentary paper †. Before the case of *Wright v. Cadogan* ‡, it was well established that a *feme covert* might have power to dispose of land by writing, in the nature of a will, so as to bind the heir, by reserving to herself on her marriage such right by way of trust, or a power over an use ; but, by that case, the doctrine was carried further ; for there, articles having been entered into before marriage whereby it was stipulated by the husband that all the estate of his future wife, which she then had, or which at any time

\* 3 Bro. C. C. 8. *Fettiplace v. Gorges*.

† 2 Vern. 535 *Gore v. Knight*, Prec. in Ch. 255.

‡ 11 Vin Abr. 141.

§ Dougl. 707, *Stone v. Forsyth*. 3 Atk. 156. *Ross v. Ewer*. 1 Burr 431. *Jenkin v. Whitehouse* 2 Bro. C. R. 392. *Cothay v. Sydenham*.

¶ 6 Bro. P. C. 156.

should descend or devolve upon her, should be conveyed to her own use, and subject to her appointment, it was adjudged that an appointment executed by her in favour of her husband, and her children by him, was a good appointment against the heir, although no conveyance was ever executed, nor any fine levied of the reversion<sup>b</sup>.

Mental  
incapacity,  
fraud,  
duress,

No person who is not of a reasonable mind and sane memory can make any disposition by will: therefore an idiot, or person deprived of his faculties by extreme age<sup>c</sup>, or by intoxication, while the paroxysm endures, is not of testamentary capacity in the law. For the same obvious reason a lunatic is incapable of disposing of his property by will, except in his lucid intervals, if they occur, and they must be calm and clear intermissions, attended with quietness and freedom of mind\*. If a will by a lunatic be rationally

<sup>b</sup> See the notice taken of this case in *Doe v. Staple*, 2 T. R. 684.

<sup>c</sup> 6 Rep. 23 Marquis of Winchester's case.

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\* A case some little time ago was determined in the prerogative court relative to the validity of a will which may help to illustrate these points. A will of F. E. Esqr. was propounded by S. S. Spinster, named an executrix therein, and opposed by the widow and son of the testator.

It appeared that Mr. E. was a gentleman of respectable connections, and that family differences had produced a separation by mutual consent between him and Mrs. E. From that time Mr. E. took up his residence in various parts of England, and being in want of a person to superintend his domestic arrangements, he, in May, 1806, made choice of Miss S. for that purpose. He was shortly afterwards seized with a paralytic affection, from the effects of which, added to the increasing infirmities of age, he suffered greatly. Through the interference of his son at this juncture,

drawn up, and the nature of the disorder be such as to afford any reasonable ground to suppose that a lu-

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a reconciliation was effected between the deceased and his wife, and he accordingly invited her to take up her residence with him. In October, 1807, she complied with this invitation, and then found Miss S. officiating in the superintendence of Mr. E's domestic affairs ; but she quitted the house in November following, in consequence of the criminal intimacy which she suspected to exist between Miss S. and Mr. E. Mr. E's health declined considerably. The will, it appeared, was drawn up by the deceased, in the summer of 1809. He kept it by him until the 5th of July, 1810, when he ordered his carriage, intending to drive to the house of his friend C. but meeting him on the road, they returned together. They proceeded into Mr. E's library, where he told Mr. C. he had a favour to ask of him, as he was going to make his will, and leave him an executor ; and pointing to a drawer in the table, said he would find the will there, adding how necessary it was for every body not to be without a will, but particular for him. The will was then produced, and purported to devise the testator's freehold property to his son, subject to the settlement made on his marriage. It also gave an annuity of 600*l.* to Miss S. and any house the testator might reside in at his death, with the furniture, plate, linen, horses, carriages, &c ; concluding with a bequest to her of all the rest of his personal property, and appointing her and another executors. Mr. E. then desired Mr. C. to draw up the codicil, appointing himself an additional executor, and giving him and the other executors 500*l.* each for their trouble, which he accordingly did, and both papers were then executed in the presence of Mr. S. Miss S's father, and another witness.

The validity of these two instruments was opposed by the widow's son upon the two grounds of an undue ascendancy exercised over the testator's mind by Miss S. and his total incapacity, as well at the time of making the will, as before and subsequent to it ; and in support of this, a variety of circumstances were adduced. It was stated, that Miss S. had taken advantage of the deceased's infirmity of mind to produce a criminal connection between them ; that they afterwards lived in open adultery ; that she introduced her father and mother into the house as inmates, and endeavoured to estrange

cid interval may have prevailed, the very act itself furnishes an evidence not easily resisted of that sound

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his affections as much as possible from his son, and his family ; that they conspired together to obtain the deceased's property, and often spoke of the will as having been obtained by a plot of their's, and treated the deceased as insane, as in fact he was ; that in the spring of 1810, he began to commit the most extravagant acts, purchasing large quantities of poultry, jewellery, &c. for which he had no occasion, destroying the furniture, &c. about the house, ordering dinner at a particular hour, and then insisting upon having it, though raw, two or three hours sooner, and throwing the gravy and sauce over those at the table. Several letters, also, pompously and improperly addressed, and otherwise indicative of insanity, were produced, as having been written to persons with whom he had formerly corresponded in the most accurate manner, and by whom he was esteemed, as in fact he was till then, a man of uncommon judgment. He was shortly afterwards placed in the care of keepers, and in November following, a commission of lunacy having issued, an inquisition was held, and the Jury returned a verdict of insanity without lucid intervals, from the 1st of July preceding, five days prior to the transaction of the will. He was then removed to Dr. Willis's, at Hoxton, where he died in October, 1811.

In reply to this, circumstances were adduced on the part of Miss S. to shew that she possessed the confidence of the deceased, but without any undue means ; that his displeasure was very great against his son for not coming to see him, and that he often declared it would be thousands out of his way ; that Miss S's connection with the deceased, far from being notorious, was hardly known, and her father was introduced into the house to manage the deceased's farming concerns, with a salary of 40*l.* per annum, only on account of the deceased's good opinion of his skill in those matters : that the deceased continued of sound mind, managing his affairs, and drawing drafts on his bankers, until the 12th of July, 1810, and even wished Miss S. to go with him the day the will was executed, excusing her solely on account of ill health.

^ A great mass of evidence was adduced in proof of these different

and disposing mind which is necessary to its validity. As in the case of *Cartwright v. Cartwright, Michael*·

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representations of the case on either side, and the arguments of counsel heard at great length thereon, during three days; it being contended, on the one hand, that there was no proof of undue influence or control over the deceased, but that the will was the spontaneous act of a capable testator; and, on the other hand, that not only was an undue control proved, but also actual and positive incapacity, for a period long antecedent and subsequent to the making of the will, as well as at the very time.

Sir JOHN NICHOLL recapitulated the circumstances of the case. He was of opinion that the acts of extravagance committed by the deceased, coupled with the verdict of the jury upon the inquisition, left no doubt of the deceased's having been afflicted with insanity. Where there was, *prima facie*, no proof of this, the presumption of law was always in favour of the testamentary act; but when it was otherwise, the *onus probandi* was thrown upon the party setting up the act; and the question, therefore, in the present case was, whether the papers propounded were executed by the deceased during a lucid interval. He proceeded to an examination of the doctrine of lucid intervals, as laid down by Lord Thurlow, that positive proof must be shewn of the disorder having been wholly thrown off for the time: there must be a complete lucid interval applying to the particular act in question, for if there was but a single word "sounding the folly," it was conclusive against the presumption of a lucid interval sufficient for legal purposes. Collateral circumstances, however, such as whether the act was a natural disposition, or in favour of persons exercising an undue control, might considerably influence the enquiry, as they were material to shew the probability of the act's being the spontaneous exertion of the deceased's mind; and the present case was, therefore, to be examined upon these principles. He then entered into the private history of the deceased and Miss S., observing that, with all the court's caution in listening to the evidence of servants in the house, still these circumstances must have their weight. They were, however, strongly confirmed by the account given of the deceased's incoherent correspondence; and the very fact of his wishing his wife and son to visit him when living in a state of open prostitu-



mas, 1795, before the delegates. The proposition of Lord Thurlow in the *Attorney General v. Parnther*<sup>d</sup>, that where lunacy was once established by clear

<sup>d</sup> 3 Bro. C. C. 441.

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tion with this girl was in itself a proof of insanity. Looking then, at this evidence, it was not only sufficient to throw the burden of proving capacity upon the parties setting up the will, but it likewise proved the influence they exercised over the deceased; and it would be difficult to imagine the evidence that would be sufficient to sustain a will under such circumstances. Mr. S. must have known of his daughter's prostitution; and this, added to his general conduct, did not go to confirm his attestation of the act in question. Mr. J. and Mr. C. were both renouncing executors, and had released their legacies; the latter was also the writer of the codicil in his own favour. It was therefore probable, that they had expectations from the bounty of the executrix; and though this was not sufficient to discredit them, it must necessarily raise the suspicion of bias. There was no reason to believe that the deceased's declarations of having made his will referred to either of the papers in question: and they had the effect of disinheriting his son from one considerable part of his property, only to make an unreasonable provision for a woman with whom he lived in public adultery. The will itself bore strong internal marks of confusion and irregularity, and appeared to have been copied from some other not before the court. It was written very irregularly, with some names partly omitted in places, and others repeated in a varied manner, altogether shewing the deceased's confusion at the time, and, in the language of Lord Thurlow, "sounding his folly." So far, therefore, from any lucid interval being proved, there was every presumption of the continuance of the disorder, a presumption confirmed not only by the general state of the evidence, but also by the contents and appearance of the will itself. The court was, therefore, bound to pronounce against its validity; and considering the active part taken by Miss S. in this transaction, with all its attendant obloquy, the court felt that it would not sufficiently mark its disapprobation of such practices, and hold out a discouragement of them for public example, did it not condemn her in the costs incurred. Costs decreed accordingly.

evidence, the party ought to be restored to as perfect a state of mind as he was in before his disorder, to make a good will, was denied by the present Lord Chancellor, who observed, that we might suppose the strongest mind reduced by the delirium of a fever, or any other cause, to a very inferior degree of general capacity; and yet he might be competent to the making of his will, especially of personal estate<sup>e</sup>. And the rule is clear that there must always be the *animus testandi*, or the instrument purporting to be a will is of no effect in the law. The parties must therefore be free, and under no compulsion from such threat or violence as may reasonably be supposed to move a constant man. But if, when the fear is past, or the restraint removed, the testator confirms the will, it is made good<sup>f</sup>. So likewise, wills procured to be made by artful misrepresentations and fraudulent contrivance, are void. And the question as to the existence of fraud, in cases of real estate, is properly examinable in courts of law, on an issue of *devisavit vel non*; but fraud as to a personal will, belongs to the jurisdiction of the spiritual court.

If infancy, non sane memory, ideocy, coverture, or duress exist at the inception of a will, it is absolutely void, though the disability should happen to be removed before the consummation by death, for there must be a good inception, and the party must be qualified when the will is made<sup>g</sup>. But if there be no disability when the will is made, a subsequent loss of intellect will not revoke it. But the will of a woman

<sup>e</sup> 11 Vez. Jun. 11.<sup>f</sup> Swinb. 475.<sup>g</sup> Plow, 343. Raym. 84. 1 Eq. Ca. Abr. 171. 2.

is revoked by her subsequent coverture, as will be seen in a future part of this work.

How affected by conviction, attainder, outlawry, and self-murder.

A person attainted of treason forfeits lands and goods, and is of course incapable of disposing of them by his will. So a felon, upon attainder, forfeits the fruits of his lands for the year and the day; after which they escheat to the Lord of the fee. But the forfeiture of goods and chattels is absolute, as well in felony as treason; differing from the forfeiture of lands in respect of its commencement, the latter taking place upon the attainder, and not before; the former upon the conviction. It follows, therefore, that if the party dies, before attainder in the one case and conviction in the other, the forfeiture is saved; and his will either of lands or goods is effectual. But if conviction or attainder takes place, the will of the traitor or felon, as to his goods, by the conviction, and as to his real estate, by the attainder, is rendered void; and *that*, although such will was made before either the conviction or attainder. The King's pardon restores the disposing capacity, and the party may afterwards make his will, as if no conviction had taken place: and it seems, that by such pardon, any will made before conviction recovers its former force and effect<sup>b</sup>. Though it may be doubted whether a will or testament made after conviction, would be rendered operative, as not having had a legal and valid inception. The will of a *felo de se* may, it seems, be effectual, as to his lands, because these are not forfeited but by attainder, which cannot be in this case. But as to his goods and chattels his will is of no effect (1).

<sup>b</sup> Swinb. 97.

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(1) Plowd. Comm. Eng. Ed. Hales v. Petit, and observe the subtle grounds on which this point was there reasoned. By the early

An alien enemy without the King's licence to reside in this Country is incapable of making any will. But with such licence, and an alien friend without any such licence, may bequeath personal estate. Either description of alienage incapacitates for *holding* land, and consequently for devising it. But leases of houses for habitation may be held by alien friends, and will pass by their wills<sup>1</sup>.

One who is outlawed in a personal action, forfeits his goods, and is therefore incapable of disposing thereof by his will; but it seems he may devise his lands<sup>2</sup>. And it is to be recollected that the wills of traitors, felons, aliens, and outlawed persons, are void only as to the King or Lord of the Fee, who has the right to the lands or goods, by reason of the forfeiture: the will is good as against the *testator himself* and all *other* persons.

As the person devising or bequeathing must be one who is capable of making a will, so the devisee or legatee must also be capable of taking under it; and if he dies before the testator the gift vanishes. If pro-

<sup>1</sup> 1 Bl. Com. 372 Harg. Co. Litt. 2 B. note 8.

<sup>2</sup> Swinb. 107.

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jurisprudence of Rome a will was not only not invalidated by the suicide of the testator, but it was not uncommon for persons to prevent the confiscation of their property which would otherwise follow upon capital punishment by killing themselves, and the validation of their wills under such circumstances according to Tacitus, Annal. lib. 6. s. 29. was the *pretium festinandi*. But this *pretium festinandi* was taken away altogether by the later emperors: And the wills of persons committing suicide were only allowed to have effect where the act of self-destruction was occasioned by impatience of pain or loss of reason. Cod. 1. 6. tit. 22. sect. 2.

perty be given by will to one and his heirs or executors, neither the heir nor executor are capable of taking originally; if the original object of the gift be dead, there is no person to whom the designation can apply<sup>1</sup>.

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### SECTION III.

#### *Estates by Custom.*

Neither  
the statute  
of wills nor  
the statute  
of frauds  
extends to  
copyholds:

IT may be received as settled doctrine, that wills of copyholds stand clear of the statute of frauds as well as of the statute of wills. It has before been observed, that the statutes of Henry VIII. for the full exercise of the testamentary power required the tenure to be in socage, which is not the description of copyhold tenure, and therefore, for that reason the statutes of wills would not apply to this description of estate. Copyholds could not for another reason, be considered as having been embraced within the intention of those statutes, because their purpose was to revive the testamentary power with certain qualifications and restrictions, after the statute made for carrying the possession and legal estate to the use had either suppressed its exercise, or driven it upon new expedients for its preservation: But the statute of uses had not interfered with the uses raised upon surrenders\*, those being properly executed by the admittance, which operated as a new grant thereof by the lord pursuant to the surrender. Neither, indeed, could it be properly said, that copyholds were ever devisable, for a will can have no effect upon them

<sup>1</sup> Plowd. 345. Brett v. Rigden.

\* 2 Vez. 267.

as a will, so that it was always necessary first to pass the estate by a surrender thereof, into the hands of the lord, to such uses as the surrenderer should, by his last will, appoint, and then his will succeeded to this act as an appointment or declaration of the use<sup>b</sup>.

By thus regarding the surrender as the mean whereby the lands themselves are transferred, and the will, as having no specific operation under the statute of wills, but as a mere declaration of an use, or rather an appointment of the person to be admitted upon the surrender, we see the reason (not always indeed approved of) for holding wills of copyhold lands to be out of the statute of frauds, there being no *special* provision applicable to copyhold estates contained therein. Accordingly in *Carey v. Askew*<sup>c</sup>, it was held by Sir Lloyd Kenyon, Master of the Rolls, that any testamentary paper would be sufficient to pass copyhold lands; and his Honour said, “he hardly expected to hear it seriously argued; it had been held, that a will received by the ecclesiastical court would govern the surrender of a copyhold. It would be removing landmarks to entertain a doubt upon the subject.”

Lord Macclesfield<sup>d</sup> admitted the same doctrine as perfectly settled in his time, though certainly not with any approbation of its reasons. He said, that it was plain, that as to the case which had been put of a copyhold surrendered to the use of a will, and afterwards devised by a will attested by one or two witnesses, this had been adjudged to be good, and that

Lords  
Maccles-  
field and  
Hard-  
wicke not  
satisfied  
with the  
reason

<sup>b</sup> See the case of *Royden v. Malster*, 2 Roll. Rep. 383.

<sup>c</sup> 2 Brown, C. R. 58.

<sup>d</sup> 2 P. Wms. 258.

his opinion was, *never to shake any settled resolution touching property or the title of lands*, it being for the common good that these should be certain and known, *however ill-grounded the first resolution might be* ; but if that had not been settled it might be more reasonable to say, when a man has surrendered his copyhold to the use of his will, a will of this copyhold shall be so executed, and in such a manner, as by the act of parliament a will of lands ought to be executed.

Agreeable to which opinion of Lord Macclesfield was that of Lord Hardwicke in the Attorney General *v. Andrews*°, who, after mentioning this established doctrine in respect to wills of copyholds, observed that, perhaps, if those determinations were now originally to be considered, courts of law and equity would not have gone so far ; and that it might be wished it were altered, as it is subject to the same inconvenience as the devise of freehold lands.

Same doctrine as to trusts of copyholds

The sentiments of Sir Joseph Jekyll seemed to accord with those of Lord Chancellor Macclesfield, on the impropriety of going *one jot farther* than the doctrine had already gone in respect to the devises of copyholds ; and, therefore, he took a distinction between a devisee of the *legal* estate in a copyhold, duly surrendered to the use of the will of the surrenderer, (as to which he admitted that the attestation of witnesses was not necessary,) and the devise of a *trust* or *equity of redemption* of a copyhold. This opinion appears in a memorandum of the reporter, in 2 P. Wms. 259. annexed to the case of Wagstaff,

*v. Wagstaff*, which was as follows.—“ Memorandum in Hil. vac. 1727, in a cause at the Rolls, his Honour admitted it to be settled, that where a copyhold in fee is surrendered to the use of one's will, such will, though executed in the presence of one or two witnesses, is good, because it passes by the surrender and not by the will, which is only a declaration of the use of the surrender ; but that if a copyholder be seised only of the *trust* or *equity of redemption* of the copyhold, and devise such trust, or equity of redemption, there must be three witnesses to the will ; for here can be no precedent surrender to the use of the will to pass this trust ; and the trust and equity of redemption of all lands of inheritance are within the statute of frauds and perjuries, otherwise great inconvenience would arise therefrom ; and it is no prejudice to the lord of a manor to comprise the trust of a copyhold within that statute, because the person who has the legal estate in the copyhold, is tenant to the lord, and liable to answer all the services.”

But in *Tuffnell v. Page*, before Lord Hardwicke in 1740, a different opinion, and which is the doctrine as now understood, was maintained by that chancellor on this subject. His Lordship said, he would consider the case in two lights—first, whether the will of a copyholder, unattested by witnesses, was sufficient to declare the uses of a surrender, made to the use of a will ; and, secondly, where there is no surrender, as in the case before him, whether such a will was sufficient to pass the trust of the copyhold lands to the plaintiff.

With respect to the consideration of the question



in the first of these lights, his Lordship said, that “where a man was seised of copyhold lands and surrendered to the use of his will, and executed a will, though not attested by witnesses, yet it should direct the uses of the surrender; for the clause in the statute of frauds and perjuries, which required the testator’s signing in the presence of three witnesses, and their attestation in his presence, was confined only to such estates as passed by the statute of wills 34 H. 8. c. 5. which was an act to explain one made in the 32d of the same King; and which at the close of the section enacted, that the words, estate of inheritance, in the former statute, should be declared, expounded, taken, and judged of estates of fee simple only, which shewed plainly, that it did not extend to customary estates, and had been so settled ever since the case of the Attorney General *v.* Barnes. This was reported in 2 Vernon, where it was said in page 398, “as to such of the lands as were copyhold, it was agreed they were well appointed, they passing by surrender and not by will, though there were no witnesses to it.”

As to the second point, whether the will in question would pass the *trust* of the copyhold lands, his Lordship said, that “where the legal estate was in trustees, the *cestuy que trust* consequently could not surrender, but the lands should, notwithstanding, pass by this devise according to the general rule that equity follows the law: for a copyhold would pass under a will without three witnesses, or where there were no witnesses at all; and if this nicety was not required in passing the legal estate, *a fortiori* it was not in passing the *equitable*: and, therefore, the

*cestuy que trust* might, by the same kind of instrument, dispose of the trust estate, as if he had the legal estate in him."

It has been doubted, whether such testamentary appointment of copyhold lands, after a surrender to the uses thereof, may not be by parol, for if copyholds are not affected either by the statute of wills, or by the clause respecting wills in the statute of frauds, a testamentary disposition of them, as such, seems to be no more necessary to be in writing, than the devises by the custom of particular places which operated independently of the statute of wills, and might, *after* that statute, and until the statute of frauds expressly restrained them, have been made by word of mouth; and if such wills of copyholds be regarded as mere appointments, they are still clear of the first and third clauses of the statute—by the exclusive wording of the first, and by the express exception in the last. And by a late case, *Doe d. Cook v. Danvers*<sup>f</sup>, it has been determined that they cannot be regarded as declarations of uses or trusts, so as to be within the 7th section of the same statute.

Whether an appointment or declaration of the uses of a copyhold surrendered may be without writing?

As the attestation of three witnesses is not *necessary*, so neither has it any *efficacy* in respect to copyholds; so that if a surrender be made to such uses as the surrenderer shall appoint by his will, and he afterwards make his will, executed and attested according to the statute of frauds, such will is nevertheless subject to be revoked or republished by him by any subsequent testamentary paper, attested by one or two witnesses only, or without any attestation at all<sup>g</sup>.

An attested will of copyhold may be revoked by an unattested will.

<sup>f</sup> 7 East, 299.

<sup>g</sup> Vid. *Burkitt v. Burkitt*, 2 Vern. 498.

If any mode of execution be prescribed with respect to copyhold it must be observed.

How far such will, though it operates as an appointment or declaration, partakes of the qualities of a will.

If a surrender be made to the use of a will, to be executed with those or any other solemnities, it is clear that such prescribed requisites must be strictly complied with as in other similar cases<sup>a</sup>.

Upon the whole it is clear that although a will of copyholds is said to work as a declaration or appointment of the use only, and this is the ground upon which it is held to stand clear of the clauses regarding wills in the statute of frauds, yet it partakes of the quality of a will in many essential particulars; thus it is revocable by alteration or cancelling, and is altogether an ambulatory instrument until the death of the party; so that if the appointee die in the lifetime of the testator, the devise fails; for the act remains incomplete, and the instrument is without operation and mute until the testator's decease.

A will disposing of the equitable estate in customary freeholds must be executed and attested according to the statute of frauds.

But although it seems now to be regarded as settled, that the trust or equity of a copyhold estate will pass by a will not executed or attested according to the statute of frauds, upon the principle of *equitas sequitur legem*, and on the ground that a strictness which had been dispensed with in respect to the *legal* estate in copyholds, ought *a fortiori* to be dispensed with in respect to the *trust* estate in copyholds, yet a different doctrine seems to have obtained concerning the equitable interest of a *customary freehold*, where there exists no custom of the manor for surrendering them to the use of a will. This was so held in the case of *Hussey v. Grills*<sup>1</sup>, where Elizabeth Prowse, being seised of a customary estate within the manor of Stoke Climsland in Cornwall, surrendered it to

<sup>a</sup> Vid. *Cotton v. Layer*, 2 P. Wms. 623.

<sup>1</sup> Ambl. 299.

Thomas Jones and his heirs, who afterwards declared the trust to be for Elizabeth Prowse, her heirs, and assigns, and covenanted to surrender to such uses, as she should by deed, executed in the presence of two witnesses, or by her last will appoint. E. Prowse afterwards made her will on the 24th January 1753, in writing, but not attested according to the statute of frauds; (but which seems to be mistakenly reported (3), as the decision and reasoning of the case plainly supposes and requires the will to have been effectual, and consequently executed according to the statute,) and devised the customary estate to Margaret Archer, her heirs and assigns for ever. She afterwards made a codicil in her own handwriting, but unattested, and thereby revoked the devise in her will of the customary estate, and gave it to Margaret Archer for her life only, with remainders over; and the doubt was, whether the codicil was a good revocation of the will, and passed the customary estate.

The Lord Chancellor Hardwicke said, that the question was, whether these customary estates were, in point of conveyance, or devise by will, so far like copyholds, that the determinations with respect to the latter shall govern these in like manner and parity of reason. That courts ought to avoid making large and liberal constructions to take cases out of the statute of frauds; which was made to ascertain property, and the words whereof were very extensive. That copyholds were not devisable by will, nothing passing out of the surrenderer till the will was made; and when it was made, the lands did not

(3) The cases in Ambler seem to be a very careless compilation.

pass by the will; the devisee might come and be admitted on the foot of the surrender and will taken together; just as if the name had been inserted in the surrender itself. That the ground of his opinion in *Tuffnell v. Page*, was *equitas sequitur legem*. That customary freeholds and copyholds differed extremely in their nature: the latter being of a base tenure, and by the old common law, held at the will of the lord, though now established on a more firm footing; customary freeholds never were of the base kind. That Jones was a trustee, and the legal estate was in him. There was no evidence that there could be in that manor a surrender of a customary freehold. It was agreed that there never was such. That the foundation of the determination as to copyholds was, that the party might dispose by surrender and will. As there was no method of passing the legal estate of these customary freeholds in that way, there was no reason to hold them out of the statute. And if the legal estate was not so, so was not the trust. There was something, observed his Lordship, arising out of the declaration of trust, which induced him not to make a large and liberal construction; for as two witnesses were required by it to the execution of a deed, it seemed strange to think, that in case of execution by will, it might be on a loose paper, without any witnesses at all.

But where there is a custom for surrendering these equitable estates to the uses of a will they

It has been held, however, in the late case of *Cook v. Danvers*<sup>k</sup> that such customary freeholds where there is a custom for surrendering them to the use of a will are as much out of the statute of frauds as common copyholds; and it should seem that the trust

also of such estates would, by analogy to the principle of the case of *Tuffnell v. Page*, be considered as out of the statute.

seem to be out of the statute.

It seems scarcely necessary, after the opinions and determination which have been produced, to observe to the reader, that in a devise of a *trust* or *equitable estate* in freehold lands, the formalities of execution and attestation, required by the statute, are as necessary to be observed as in wills disposing of the *legal* estate. There can be no question, said Lord Maclesfield<sup>1</sup>, but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same inconveniences as to frauds and perjuries as were occasioned before the statute, by a devise of the legal estate in fee simple.

All equitable estates of freehold must be devised by a will executed and attested according to the statute.

Though the necessity of writing imposed by the statute of Charles was already a condition of their validity by the statute of wills, yet this requisition of the second act was not nugatory, since lands that were deviseable by local custom, (for enforcing the testamentary dispositions whereof the register has furnished an appropriate writ<sup>m</sup>.) were left untouched by the statutes of Henry (4).

Wills of lands deviseable by custom, must be in writing by the express direction of the statute.

<sup>1</sup> 2 P. Wms. 258.

<sup>m</sup> *Ex gravi querela*.

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(4) But it may still in some certain cases be necessary to resort to the custom of a place; as where it enables an infant of *fourteen*, or, perhaps, a *feme covert*, neither of whom is capable, under the statutes, of devising lands. Vid. 2 And. 12. where it is said that a custom enabling an infant *under 14*, (at which age, and not before, the law supposes some discretion,) would not be good.

## SECTION IV.

*Estates pur auter Vie.*

THE 12th section of the statute of frauds enacts as follows —“ And for the amendment of the law in the particulars following, be it enacted, that from henceforth any estate pur auter vic shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee simple, and in case there be no *special occupant* thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.”

As by this provision of the statute of frauds these freeholds, held for the lives of others, are made devisable as fee simple estates, the statute of fraudulent devises<sup>a</sup>, which vacates devises of land as against speciality creditors, has been clearly held to attach upon this newly (1) devisable property, in the same

<sup>a</sup> 3 and 4 W. and M. c. 14.

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(1) These estates pur auter vie, could not be devised within the statutes 32 H. 8. c. 1. and 34 and 35 H. 8. c. 5. which last statute explains estates of inheritance to mean estates of fee simple only.— Per Curiam, in *Took v. Glascock*, 1 Saund. 261. These estates of occupancy were neither devisable nor subject to debts before the statute of frauds. *Ragget v. Clerke*, 1 Vern. 234.

manner as upon fee simple estates. But as the quality of these estates may be much affected by the terms in which they are granted, being sometimes limited to go to the heirs, and sometimes to the executors, administrators and assigns, which may vary the result as to the operation of testamentary dispositions, it may be useful to take rather a large view of their nature, and the consequences of the several enactments regarding them.

By the common law, where a man was tenant for the life of another, by virtue of a grant to himself only, without mentioning his heirs, and died during the life of him for whose life the estate was holden, in such a case the first occupant, or he who could first get possession of the land, was authorised to keep such possession as long as the cestui que vie lived; and this was called general or common occupancy. But this title of general occupancy has given place to the regulations of the statute 29 Car. 2. c. 3. and the subsequent statute 14 Geo. 2. c. 20. But by the 9th section of the statute last-mentioned, which recites that by the former statute it had been enacted, that estates pur auter vie, whereof no devise should be made, should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands, and that doubts had arisen, where no devise had been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners were fully satisfied, should belong, it is provided, “ that such estates, pur auter vie, in case there should be no *special occupant* thereof; of which no devise should have been made, according to the said act for prevention of



frauds and perjuries, or so much thereof as should not have been so devised should go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate."

Lord  
Vaughan's  
opinion  
that this  
estate  
comes to  
the heir by  
a proper  
descent.

Wherever the limitation in these grants *pur auter vie* is to the grantee and his heirs, the heir at common law is the person to take upon the death of the tenant in the life-time of the *cestui que vie*, and in such a case there never was any room for general occupancy, if there was any heir to take. But in what *character* or *capacity* he takes has been a question on which very great lawyers have held different opinions. Lord C. J. Vaughan in the great case of *Holden v. Smallbrook*<sup>b</sup>, held, that if a man demised land to another, and his heirs *habendum pur auter vie*, or granted a rent in the same manner, though the heir should have the land or rent after the grantee's death, yet he had it not as a *special occupant* (as the common expression was); for if so, such heir would be an *occupant*, which he could not be, but he had it as *heir*, not of a *fee*, but of a *descendible freehold*, and not by way of limitation as a purchase to the heir, but by descent, though some opinions are, that the heir took it by special limitation. But the Chief Justice added, that he did not see how, when land or rent was granted to a man and his heirs, *pur auter vie*, the heir could take by special limitation after the grantee's death, *when the whole estate was so in the first grantee that he might transfer it to whom he pleased*, so as to deprive him who was intended to take by *special limitation* after the grantee's death.

This reasoning is certainly very powerful, but other

<sup>b</sup> Vaughan, 187.

Judges, though they have adopted the phrase of Lord Vaughan, of descendible freehold, have adhered to the notion of occupancy in the heir, and have denied the inheritable nature of this kind of estate. Thus in *Low v. Burron*<sup>c</sup>, Lord Chancellor Talbot held clearly that an estate to one and his heirs *pur auter vie* may be limited to A. in tail, remainder to B., for in such cases of limitations to the heirs of the first taker, the word *heirs* was only a description of the persons to take as *special occupants* during the life of *cestui que vie*. These estates are not estates tail (2), for all estates tail are estates of inheritance to which dower is incident, and which must be within the statute *de donis*; whereas in this kind of estate which is no inheritance, there can be no dower, neither is it within the statute (3). Furthermore an estate tail is not liable to forfeiture, or punishable for waste, the contrary whereof is true of the estate in question.

Again, by the same Chancellor it was held, in *Chaplin v. Chaplin*<sup>d</sup>, that where a lease is made to a man and his heirs, during lives, the heir does not take by descent, but as a special occupant; and though it be called a descendible freehold, it is not really a descent, being no more than if there had been a designation of any person by name to

<sup>c</sup> 3 P. Wms. 362.      <sup>d</sup> 3 P. Wms. 368.

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(2) Therefore, if a freehold lease for lives be limited to A. and the heirs of his body, with remainders over, A. may dispose of the whole, and defeat the remainders, by any conveyance during his life-time, or, as it seems, by his will alone. *Doc. dem. Blake v. Luxton* 6 T. R. 289.

(3) It is plain there can be no occupant of an estate tail, because none can have the estate tail but the issues of the donee, who *must* take by *descent*.

enjoy the estate for three lives, after the death of the father, instead of the heir at law. It has been accordingly holden, that in such a case the parol shall not demur, which is always allowed in the case of a proper descent to an infant. And it is also to be observed, that such a succession to this estate is no descent to toll an entry\*. Accordingly if a disseisor make a lease to a man and his heirs, during the life of I. S. and the lessee die, living I. S. the entry of the disseisee is not thereby taken away, because he that died seised had but a freehold, and the heirs are added to prevent the occupant†. So that from this reasoning it results that this estate is not so properly a descendible freehold, as a freehold limited to go in a course of descent; which limitation prescribes only who shall be the occupant, without changing the nature of the estate into an inheritance(4). Yet Lord Vaughan observes, that the heir of the grantee *pur auter vie* might certainly recover by a writ of mortdancerster, in case of abatement, which, he says, infallibly proves the heir to take by descent, as succeeding to one who died seised *as of a fee*, though not seised *in fee*; for which he cites Bracton (5). But

\* Litt. Sect. 387.

† Co. Litt. 239. a.

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(4) It is true the course of succession must certainly follow the inheritable quality of the land. Thus it has been held that where a lease was made to a man and his heirs, during three lives, of lands in Borough English, the youngest son shall inherit this descendible freehold. But there the special occupancy is only regulated as in the other cases, by the descriptive force of the word *heir*, taken *secundum subjectam materiam*. 2 Freem. 395, 399. Co. Litt. 110. b.

(5) Si autem fiat donatio sic, ad vitam donatoris, donatorio et hæredibus suis; si donatorius præmoriatur hæredes ei succedent, te-

in Walsingham's case, in Plowden, the learned Apprentice stated *arguendo* that the heir in such a case should not have an assize of mortdancester, and he was not contradicted.

If a man grant an annuity to another to hold to him and his heirs for the term of another's life, and the grantee die during the life of the cestui que vie, his heir shall have it, according to Littleton<sup>c</sup>, who nevertheless concludes with a *quære de ista materia*. Upon which Lord Coke observes, that in the case of land the heir shall have it, to prevent an occupant; and so it is in the case of an annuity, or of any other thing that lies in grant, whereof there can be no occupant (6).

It is worthy of observation, that in Swinnerton's case, in Dyer<sup>b</sup>, where a rent was granted by fine to F. to hold to him and his assigns during the life of Cassandra, the grantor's wife, and if it should be behind, *quod bene licuit dicto F. et hæredibus suis, durante vitâ dictæ Cassandræ distringere*, and F. devised

<sup>c</sup> Sect. 739:<sup>b</sup> Dyer, 252.

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*nendum ad vitam donatoris, et per assisam mortis antecessoris recuperabunt, qui obiit ut de feodo. Bract. l. 2. de acquirendo rerum dominio. c. 9.*

(6) At law there could be no *general* occupant of a rent; as, if a rent were granted to A. for the life of B., and A. had died, living B., the rent would have determined, 2 Roll. Abr. 150. But there might have been a special occupant. Under the statute of frauds, however, every estate *pur auter vie*, whether corporeal or incorporeal, is made devisable, and if not devised away, is made assets in the hands of the heir, if limited to the heir, and if not limited to the heir, is made assets in the hands of the executors or administrators of the grantee.

the rent and died, living Cassandra, Dyer was of opinion that the devisee should have it, for by the clause of distress F. had the fee simple determinable upon the death of Cassandra; which seems an extraordinary opinion, and certainly opposed by the resolution in Chudleigh's case<sup>1</sup>, and numerous other authorities, wherein it has been uniformly held, and never doubted, that an estate to one and *his heirs*, during the life of I. S. is but an estate for life, upon which a remainder may depend. And the three classes into which a fee is distributed by the very learned reporter, in his own argument, in Walsingham's case, clearly excludes this estate out of any description of a fee; either the fee simple, the fee simple determinable, or the base fee (7).

The question, upon the whole, seems to remain in some uncertainty as to the true nature of the estate where the grant is expressly to a man and his heirs *pur auter vie*, though the preponderance seems to be on the side of the doctrine which treats it as a freehold to which the heir succeeds as occupant by special designation, and not by regular title of descent.

Whether  
an execu-  
tor might  
be a special  
occupant.

There has been some controversy on the question, whether a lease, before the statute of frauds, to a man and his executors during the life of another, would go to the executor as a special occupant. Mr. Hargrave

<sup>1</sup> 1 Rep. fo. 4. b.

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(7) Plowd. Com. 557. And see Cro. El. 805, where Popham said, that rent granted to one and his heirs for the life of I. S. shall not be devisable by the statutes 32 and 34 H. 8. for it is no fee, and he added, that the greater part of the Judges were of his opinion. But Gawdy and Fenner contra.

has put this matter doubtingly in his notes to Coke Littleton<sup>k</sup> where he says, after citing some authorities the other way, “ however some have thought that executors and administrators, if named in the grant, might take an estate pur auter vie, though a freehold, even before the statutes 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. by which they are now entitled.” In *Westfaling v. Westfaling*<sup>l</sup>, Lord Hardwicke declared his opinion, that executors might take as special occupants ; and he further added, that he thought it would be assets in their hands. The same opinion is intimated by him in *Williams v. Jekyl*<sup>m</sup>. And his reason for holding such estate, so limited, to be assets, was, that he thought the executor, by force of his office, could take nothing without its being so.

In the *Duke of Devon v. Kinton* (8), where A. having an estate to him and his *heirs* for three lives, settled it on his daughter and her husband for their lives, remainder to the use of his own *executors* and *administrators*, and after the death of his daughter and her husband, devised the estate to his wife, and died indebted by simple contract, the question being whether the residue of the term should be assets to pay a simple contract creditor, it was so decreed ; for being limited to the *executors and administrators* of A. it became personal estate, and he could not devise it exempt from his debts, though due by simple contract.

<sup>k</sup> Hargr. Co. Litt. 41. b.

<sup>l</sup> 3 Atk. 466.

<sup>m</sup> 2 Vez. 681.

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(8) 2 Vern. 719. but in 2 P. Williams, 360, it appears that the lease was originally granted to trustees.

There appears, indeed, to have been a stronger reason for saying that an *administrator* could not take as a special occupant, since the law will not suffer a freehold to be in suspense, and a person to entitle himself as special occupant must enter immediately on the death of the tenant *pur auter vie*, which an administrator cannot do, though an executor may".

Whether he can take the surplus for his own benefit ; and how far the statutes have changed the nature of the estate.

It seems as if the framers of the statute 29 Car. 2. meant to apply the term *special occupant* only to the heir, and perhaps with a cautious nicety in the use of the phrase. The words, '*that in case there shall be no special occupant it shall go to the executors and be assets,*' seem virtually to include the case where the grant is express to the executors of the grantee, for if the executor *cannot* take as special occupant, it is as if he had not been named, and then the statute gives it to him for want of a special occupant.

If he *can* take as special occupant, it seems absurd to say that the statute could mean that in that character he should take for his own benefit, or, that if named in the grant he should take for his own benefit, and if not named, that then the estate should be assets in his hands. If he should be held to take as special occupant, by reading the words '*special occupant*' in the statute, as if they had been *such* special occupant, and as applying to the heir only, whose case had just been mentioned, the case of the limitation to executors is brought fairly within the statute ; and then the construction would be, that if the grant was not to the heirs, the estate should, whether executors and administrators were named or not, go to the executors or administrators as assets. But we

have seen that even if such estate limited to executors and administrators were held to be out of the statute altogether, still there is both reason and authority for saying that by force of their office simply, the property coming to them must be assets in their hands.

The statute of 29 Car. 2. c. 3. makes these estates coming to the heir by limitation, and as special occupant, for want of being devised, (and by the same statute they can only be devised by a will attested by three witnesses) assets for specialty creditors; and in the hands of the executors or administrators, where there is no special occupant, assets for both specialty and simple contract creditors. The statute of 14 Geo. 2. c. 20. s. 9. looking to the case where there is no devise or occupancy, and which had been partially provided for by the statute 29 Car. 2. makes the surplus after payment of debts applicable and distributable as personal estate. And when the force of the words "shall be applied and distributed" are properly attended to, there seems to be good ground for inferring that the legislature intended that the executor should not retain this surplus beyond the amount of the debts, as special occupant.

Supposing, under these circumstances a person to make a will, devising the residue of his personality, but unattested according to the statute of frauds, and therefore not operating immediately upon the dry legal subject, that being still in its nature freehold, though at least to a certain extent under the above-mentioned statutes beneficially applicable as personality, what is to become, in a court of equity, of the interest after debts paid? Is it to go to the legatee, to the heir,



to the next of kin, or to be retained by the executor?

Such a case presents itself under two aspects : first, suppose that before the statute the executor was, by virtue of such express limitation to executors, a special occupant, and that, the statute having enacted if there was *no* special occupant, the estate should be assets in the hands of the executor or administrator, the case might be regarded as being out of the statute where the executor was named special occupant ; in this view of it, it might become necessary to enquire what would have become of the estate in the hands of the executor, as such special occupant.

We have the decided opinion of Lord Cowper\* upon this subject, who made no difficulty of holding it to be personal estate, though originally granted to a man and his heirs, if it was afterwards by him granted to executors, though it must be remembered that when the same case was before Lord King it appeared to be in trust. In *Westfaling v. Westfaling*, above cited, it appears to have been also the opinion of Lord Hardwicke, that an estate *pur auter vie* to a man, his executors, administrators, and assigns, was assets to pay debts *before* the statute. And in *Oldham v. Pickering*<sup>p</sup>, which was a case before the statute Geo. 2. (as that case is reported in Carthew) Lord Holt seemed to entertain a degree of doubt whether such an estate was not assets to pay legacies. It appears indeed to have been the opinion of the an-

\* 2 Vern. 719.    2 P. Wms. 380.

<sup>p</sup> 1 Lord Raym. 96. Carth. 376.

notator upon the case of the Duke of Devon v. Atkins, in Peere Williams, first edition, that there was an equity to say, that, if the executor or administrator took it as special occupant, the effect of his character as executor or administrator, would fix upon his legal title an equity for those who claim the personal estate, to make him a *trustee*.

It seems, therefore, that the fate of property so circumstanced was not very well settled, independently of the statutes of Charles 2. and George 2. We perceive too, by the recital in the clause relating to this subject, in the statute of Geo. 2. c. 14. that doubts had existed after the provision by the 12th Section of the statute 29 Car. 2. c. 3. as to the persons to take after payment of the debts, and that the clause in question of the 14th Geo. 2. was made to exclude such doubts. By this statute of George 2. therefore it was provided that the surplus should be *applied* and distributed as personal estate. Upon which clause the present Chancellor declared himself to have a strong inclination that the meaning was, that the residuum of such estate was to go with the rest of the personalty, where there was a will, and to the next of kin where there was an intestacy; and that the language of the statute would bear this out, for it would be extraordinary that persons claiming by bequest should not have been attended to, when even upon the statute of Charles 2. Lord Holt doubted as to legacies.

The true state of the question in Ripley v. Waterworth<sup>1</sup> was, whether, if notwithstanding the statutes of Car. 2 and Geo. 2. the interest in such an estate comes to the executor in the nature of a free-

<sup>1</sup> 7 Vez. Jun. 425.

hold, though by force of those statutes applicable to a certain extent as personalty, he is not in a court of equity so completely a trustee for the persons entitled to the personal estate, as that a will not *attested by three witnesses*, but disposing of the residue of the personalty, will give to the residuary legatee, after the debts paid, a title to call upon the executor for his benefit. Upon this case Lord Eldon observed, that he could not adopt the principle of considering the estate as personal, to the point of giving creditors a claim upon it, without going farther. His Lordship was of opinion, that after the debts were paid in obedience to the statute, the character of executor still remained in him, whether considered as special occupant or not : that such character raised a trust in *him*, and an interest in *others*. To the extent, therefore, of giving an interest to all, who were in a situation to claim the personal estate, it *was* personal estate.

It is to be observed, that in such a case the heir could have no title ; for he could only take as special occupant, and if as special occupant, still as occupant, and there could be no occupancy without a previous vacancy, whereas the estate in the case supposed would be full of the executor. If the executor has it, the great question is, how he has it ? is it freehold or personal estate ? Is that which by one statute has been made personal to the extent of being assets, and therefore subject to be sold as such upon a *feri facias*\*, and by another statute distributable under administration out of the spiritual court, still to be considered as in the nature of freehold in the hands of the executor, against

\* Atkinson. v. Baker, 4 T. R. 231.

\* See Oldercon v. Pickering, 1 Lord Raym. 96. Comb, 291.

any person claiming the personal estate? There is besides great difficulty in saying what shall become of such an estate with this changeling sort of character belonging to it, in case of the death of the executor, if he takes it as special occupant in the nature of a freehold. Such a case would be surrounded with difficulties<sup>1</sup>. Since, however, the statute uses only the expression *pur auter vie*, not distinguishing between the grant to a man's heirs, and to his executors, in imposing the necessity for three witnesses to validate a devise of it, the residue in the case above alluded to would not pass strictly by the will. But Lord Eldon was of opinion, that in a court of equity the estate was to be considered as belonging to those who take personal estate by an equity attaching upon the character of executor *as* executor. And he resembled it to the case of stock which can properly be disposed of only by a will with two witnesses (9); but which, according to Lord Thurlow, where it is not *so* bequeathed, devolves upon the executor in trust for those who are entitled to the personal estate, under the residuary bequest; the will operating as a direction to the executor how to apply it, though it was not devised by that will<sup>2</sup>.

Upon the whole, therefore, as the question now stands, upon the authority of the much reasoned case of *Ripley v. Waterworth*, in equity at least, an estate granted to a man, his executors, administrators,

<sup>1</sup> 7 *Vez.* 445. 451.

<sup>2</sup> 7 *Vez.* Jun. 448. 452.

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(9) By 33 Geo. 3. c. 28. s. 14. and 35 Geo. 3. c. 14. s. 16. it is provided that all persons possessed of any share or interest in the funds, or any estate therein, may devise the same by will in writing, *attested by two or more credible witnesses.*

and assigns, for the life of another, though devisable as to the legal interest only by a will with three witnesses, is personal estate, or in the nature of personal estate, in the hands of the executor, and the benefit as to the surplus belongs to the legatee under the will as such, though the will is not attested, so as to pass it at law. In a word, it is personal estate as to those claiming as creditors and representatives. But yet the essential character of the estate as a freehold remains, as to other persons, who can only take the legal interest in it by a conveyance applicable to freehold property.

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## SECTION V.

### *Powers to be executed by Will.*

Powers of appointment to be executed generally by will, without any directions as to the mode in which such will is to be executed, must be executed by a will attested according to the statute of frauds.

WHERE a power is given or reserved by deed to be executed generally by a will, without any words expressing or importing the manner in which such will is to be executed, if the subject of such power is freehold estate, the power will be ill executed by any will not signed by the testator, and not attested by three witnesses by the subscription of their names in his presence, according to all the circumstances required by the statute to give effect to a devise of lands. Lord Macclesfield, in *Longford v. Eyre*<sup>a</sup>, much doubted whether the will in that case would have been a good appointment, had it not been executed pursuant to the statute; because, said his lordship, when a power is given to appoint the uses of land by deed or will the will must be intended to be such a one as is proper

<sup>a</sup> 1 P. Wms. 741.

for the disposition of land, and consequently should be subscribed by three witnesses, in the presence of the testator. For this is within all the inconveniences which the statute of frauds was intended to prevent, and the words *in the nature of a will*, mean the same as a will which must therefore be subscribed by witnesses in the presence of the testator. And according to the same chancellor, in *Wagstaff v. Wagstaff*<sup>b</sup>, if the *trust* of lands be limited to such persons as a man shall by will appoint, and the *cestui-que-trust* devises these lands by a will executed only by two witnesses, the will is void, and will not operate as an appointment. In confirmation of which, it was said by Sir John Strange, at the Rolls, in introducing his judgment in *Jones v. Clough*<sup>c</sup>, that “where the owner of an estate in land, *either in law or equity*, reserves to himself a power of disposing of it to such uses as he by will shall appoint, that must be by such a will as within the statute of frauds would be proper for a devise of lands; otherwise the statute would be entirely evaded.”

And the same doctrine holds in respect to *trust* estates.

But if the power extends over personal as well as real property, though a will made in execution of the whole power should fail as to the land for want of a sufficient attestation, it may nevertheless be a good execution of the power with respect to the personalty. Thus, where a man by his will had given several shares in the Sun-fire Office to his daughter, and after her decease to such persons as she should by her will direct, and had also devised real and personal estate in Jamaica, in moieties, the one moiety to Frances for life, and after her decease, to such person as she should by will direct, the other moiety

But if such power extends to personal as well as real estate, and the will be unexecuted to pass *real*, it may nevertheless be effectual to pass *personal* estate.

to another person, in like manner, and the daughter, by her will reciting that of her father, disposed of the Sun-fire shares, and also by the same will devised the real estate, but the will was not duly executed to pass real estate, being attested by two witnesses only, Lord Chancellor Thurlow held that the will being sufficient to pass the personal estate, was so far a good execution of the power<sup>d</sup>.

It has been said that if an agreement be entered into, to charge certain lands with a sum of money for the benefit of certain persons named, in such shares as a *third* person shall direct by his last will, such will need not be executed as the statute requires for passing real estate; but if one or more having the inheritance in them of certain lands, agree that *one of them* shall have power to charge the same with any sum by his last will, this power can only be well executed by a will with three witnesses<sup>e</sup>. This doctrine however seems very refined, and the case was one in which compassion may have had some effect.

If the owner of an estate reserves to himself, or gives to another, a power to appoint by will generally, the execution of the power must be by a will executed as the statute prescribes, with the regular attestation of three witnesses<sup>f</sup>. But if the subject of the disposition be personal only, then although the power be required in terms to be exercised by will *duly executed*, such words will import no solemnity which the subject itself does not require; the words

<sup>d</sup> Duff v. Dalzell, 1 Bro. C. R. 147. et vide Powell v. Beresford, 2 Lord Raym. 1282.

<sup>e</sup> Jones v. Clough. 2 Vez. 365.      <sup>f</sup> 9 Mod. 485, by Lord Hardwicke.

*duly executed* must refer to the nature of the act, and the nature of the thing which is intended to pass by it<sup>c</sup>.

And although the subject of the power be real estate, yet when the power is given generally, without any specification or direction as to the instrument or mode by which it is to be executed, it has been doubted whether the execution of it by will must be made as the statute directs with respect to real estate.

In the case of *Sayle v. Freeland* and others reported among the Chancery cases in *Ventris*<sup>b</sup>, and referred to by Sir John Strange, in *Jones v. Clough*<sup>1</sup>, the bill was to redeem a mortgage made by the father of the defendant, or to be foreclosed. The defendants, by guardian, answered, stating that their grandfather was seised in fee, and made a settlement, whereby he entailed the estate, but with a power of revocation by any *writing published under his hand and seal, in the presence of three witnesses*; and the case was that he made his *will* under his hand and seal, wherein he recited his power (2), and declared that he revoked the settlement; but the will had but two witnesses, who subscribed their names, though a third was

<sup>c</sup> *Poulson v. Wellington*, 533, P. Wms.

<sup>b</sup> 2 Vent. 350. <sup>1</sup> Vez. 365.

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(2) That a power may be exercised without reciting it. See 1 Atk. 559. *Molton v. Hutchinson*, ib. 441, *Robert v. Morgan*. But see as to the question whether it will be executed by the general words of a will. 3 Vez. jun. 467, *Langham v. Nenney*. 2 Bro. C. C. 297, *Andrews v. Emmet*. 4 Vez. jun. 60, *Croft v. Slee*.



actually present : the testator died, and the lands descended to the father, who made the mortgage ; the defendants claimed by virtue of the entail. But the Chancellor decreed, that the mortgage money should be paid ; and first, he said, there was an execution of the power *in strictness*, for the third witness was *present*, though he did not subscribe. But, secondly, if there had not been in strictness a good execution of the power, equity would help it in such a little circumstance, where the owner of the estate had fully declared his intention ; further adding, that there was a difference where a man had power to make leases, &c. which would charge and incumber a third person's estate, which sort of powers were to have a rigid construction ; but where the power was to dispose of a man's own estate, it was to have all imaginable favour. Here, we observe, that the power was to be exercised by a *writing*, and not necessarily by a *will*, executed in the presence of three witnesses ; and although the party chose to execute the power by a writing in the form of a will, and that will not such a one as could have a testamentary operation under the statute of frauds, yet it was not the less a writing published under hand and seal in the presence of witnesses. It has been clearly held by Lord Chief Justice Hale<sup>k</sup>, that if a power not requiring to be executed in that manner were to be executed by a bargain and sale, the deed need not be enrolled. And it may be contended on grounds of analogy to that decision, that because the donee of a general power chuses to execute it by an instrument in the shape of a will, he does not oblige himself to make it agreeably to the forms required by the statute.

Though a man by first passing the land by a sufficient conveyance, may empower himself to make a future disposition thereof by a writing, with one or two witnesses; and under such a power a will, or writing purporting to be a will, if attested according to the terms of the power, will be a good instrumentary execution of the power (3); yet it has, upon very satisfactory reasons, been determined, that a person cannot by *will* enable himself to make any future disposition of land by any instrument whatever, not executed and attested as the statute of frauds requires, in respect to wills of lands. If a will affects to reserve any power of disposition, such reservation is purely negative in its effect; it *does nothing*; unless perhaps it may serve as a positive expression of the non-effectiveness of the will itself as to certain

A man cannot by will reserve a power of disposing of real estate by a future unattested will or codicil.

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(3) For in such a case the disposition is not testamentary in its origin, but is to be regarded as merely supplemental to, or as directing the operation of the conveyance from which the power springs. But whatever terms the creator of the power chuses to subject it to, they must in general be strictly complied with. This doctrine is well laid down in *Hawkins v. Kemp*, 3 East, 410. The terms of the power required that the revocation should be by deed or instrument in writing, executed in the presence of, and attested by, three credible witnesses, and enrolled in one of His Majesty's courts of record at Westminster, and with the consent of H's wife, his father, father-in-law, and several trustees, being in all nine persons. The C. J. said that every one of these required circumstances, unessential and unimportant, except as they were required by the creators of the power, could only be satisfied by a strict and precise performance. They were incapable of substitution, because these requisitions had no spirit in them which could be otherwise satisfied. See *Mansell v. Mansell*, Wilm. 36. See also *Digges's case*, 1 Rep. 173. *Bath and Montague's case*, 3 Ch. Ca. 55. *Kibbet v. Lee*, Hob. 312. *Thayer v. Thayer*, Palm, 112. *Ward v. Lenthall*, 1 Sid. 143.

subjects, or beyond certain limits. Such lands as a testator does not actually pass or dispose of by a present declaration of his mind, remain in him to be passed or disposed of by a future conveyance or will; but by such only as are competent in law, by the perfection of their respective executions, to the gift or transfer of the property, according to its nature and requisites. And this rule obtains equally in respect to legal and trust estates; for trust estates are as much within the statute of frauds, with regard to the formalities requisite to the perfection of a will, as legal estates, since the same mischiefs would follow from the omission in the one case as the other.

If an instrument be not intended to have effect till the death of the party, it is testamentary in its operation and quality, whatever may be its form.

It is established that an instrument, whatever is its form, whether it be a deed poll or indenture, is testamentary in its operation and quality, if it be intended not to operate till the death of the party who made it<sup>1</sup>. The circumstance, and not the form, must decide the character of the instrument. Thus, therefore, the deed in the case of *Habergham v. Vincent*<sup>m</sup> could have no other operation than as a testamentary paper; and presented itself, under this *general* character, in three distinct lights—as a codicil—as an exercise of the power reserved by the will—or as an integral and original part of the will itself, by incorporation into its substance.

A codicil has a *distinct* commencement, and though it is said to be a part of the will, yet it becomes so by *first acting* upon the will, and in a manner drawing it down to the date of its own publication; and can

<sup>1</sup> Moor 177. 2 Leon, part 4, 159, 166. Audley's case, Dyer 166, a *Greene v. Proude*, 1 Mod. 177.

<sup>m</sup> 204. And see *Hamfield v. Habingham*, 10 Vez. Jun. 281.

have no operation upon *freehold* estate, either *as part* of the will, or *by its own efficiency*, unless it be attested as the statute directs.

As an exercise of a power of appointment, it is met by the rule, that a testator cannot by his will reserve a right to devise freehold estate by a future testamentary instrument, not attested according to the statute of frauds, however practicable this may be under the uses of a conveyance. Where there is a conveyance, and a power is reserved under the uses thereof, the estate is parted with, the land is gone, and the power, which is in truth only an executory use, being collateral to the land, may be limited to be executed by any instrument whatever; by a *deed* or writing, with or without witnesses: for its *specific* operation is not in question, where the terms of the conveyance reserving the power have defined the mode of its execution; though, as we have seen, if it be reserved to be executed by a will in general terms, the party will be understood to have intended a *proper* will, according to the statute. But by his *will*, a man parts with nothing before his death, till which time his will is ambulatory, incomplete, and revocable; he has the same absolute dominion he had before; and if by any subsequent act he parts with any portion of his estate, whether it be a part of that already devised, or a part affected to be specially reserved for his future appointment, he parts with it *as owner*, and not *instrumentally*, and by virtue of an *original*, and not a *derivative* power.

Difference between a conveyance to uses and a will, in respect to the legality of reserving a power of future disposition.

As to the third point, the truth seems to be, that every paper to which a will refers must be incorporated *originally* into the will itself, if real property is

Every paper to which a will, duly attested,

refers, if it  
comprise a  
disposition  
of real prop-  
erty, to be  
effectual as  
a testamen-  
tary paper,  
must either  
be incorpo-  
rated origi-  
nally into  
the will,  
or be exe-  
cuted ac-  
cording to  
the statute;  
and such  
paper, to  
be so incor-  
porated,  
must be  
distinctly  
referred to  
and descri-  
bed in  
such will.

to be affected by it, or it can avail nothing, unless it is itself executed according to the statute of frauds. And further, the rule is, that an instrument properly attested, to incorporate into itself another instrument, not attested, - must describe it so as to manifest distinctly what the paper is that is meant to be incorporated, in such way as that the court can be under no mistake". It did not appear to the court, in *Habergham v. Vincent*, that the second instrument, although testamentary in its nature, could be incorporated into the will; which referred to nothing actually in existence, but to an intention merely; and it has been sufficiently shewn, that the will could create no power with a special mode of execution. In that case, Mr. Justice Wilson said, that he believed it to be true, and he had found no case to the contrary, that if a testator in his will refers expressly to any paper *already written*, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, such paper makes part of the will, whether executed or not; and by such reference he does the same, as if he had actually incorporated it, because words of relation have a stronger operation than any other. But the difference between that case, and the reference to a future intention, is striking: in the former, said the judge, there is a precise intention mentioned at the time of making the will; for the paper makes out the intention at the time: but when a man declares he will in some future paper do something, he says, he will make a will as far as his intention is then known to himself, but he will take time to consider what he will do in future.

With respect, however, to the copyhold estate,

\* *Smart v. Prujean*, 6 Vez. jun. 565.

which was a subject of the dispositions in the case of *Habergham v. Vincent*, it was held quite clear, by the Chancellor and Judges, upon the doctrine a little before stated, that as the deed poll was capable of being regarded as a testamentary paper, it was sufficient to pass the copyholds. And from the principles of the reasoning just produced, as a testamentary paper it must have operated as a *codicil*; for it could neither be incorporated into the will as an original part of it, or operate by virtue of the power affected to be reserved by the will.

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## SECTION VI.

### *Wills charging Lands.*

WE observe, that in the above-mentioned case of *Habergham v. Vincent*, the counsel for the surviving trustee endeavoured to maintain the competency of the testator, by a will executed according to the statute, to reserve a power of future disposition of land by an instrument not perfected as the statute directs, by analogy to the case of a general charge of legacies on lands by a will duly executed; whereby it has been held<sup>a</sup>, that a testator enables himself to charge the land with any number of additional legacies, by a subsequent instrument not attested so as to pass lands. This, indeed, seems to be established doctrine with respect to legacies, which Lord Hardwicke said

By a will duly executed, charging land generally with legacies, a testator enables himself to lay any number of additional legacies on the land, by a subsequent testamentary disposition unexecuted.

<sup>a</sup> *Masters v. Masters*, 1 P. Wms. 423. and *Brudenell v. Boughton*, 2 Atk. 274. and see the late case of *Rose v. Cunningham*, 12 Vez. Jun. 29.

was attended with no greater inconvenience than arose from a man's charging his lands by will with the payment of his *debts*, which, doubtless, would extend to all the debts contracted during his life. It was insisted, however, that the statute was equally defeated by the privilege of charging land with legacies or debts to any extent by an unsolemn will, where the land has been generally charged by a previous attested will, as by a power of appointing reserved by a will; for, as to debts it was said, that by a bond, creating a voluntary debt, a testator might circuitously dispose of the whole value of his estate; so likewise, after having generally charged legacies upon his estate by an attested will, he might devise away the whole of his property by any testamentary paper, by creating a charge-equal to its value.

But, in reply to this reasoning, it was said, by the Lord Chancellor, "that it was supposed to be Sir Joseph Jekyll's opinion in *Masters v. Masters*, that it might be supported as a power, reserved to the testator, to increase the charge by a future act. That could not be the ground of his opinion. There was a manifest incongruity in the supposition of a power, reserved by a man's own will, which cannot begin to operate till all power in him ceases. The observation made by Mr. Justice Wilson was unanswerable, that it is not a personal privilege; and that no man can reserve a power to act against the forms which the law has imposed. Therefore, if it were to pass by a testamentary act, such act must have all the solemnities which the law has directed.

" But in a correct MS. note in his Lordship's pos-

session, Lord Hardwicke had stated the ground of the determination to be the analogy to the case of debts. His Lordship added, that the cases to which he had alluded, were none of them cases of a primary, substantive, independent charge upon the real estate, but a charge upon it in aid of the personal, which was *primarily* charged. Such a charge, whether for debts or legacies, was necessarily uncertain in extent, not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating.

“ A charge for legacies, therefore, (his Lordship said,) must be uncertain as to its extent ; not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating. Whatever affects the primary fund, varies the amount of the charge. Therefore, though given by a will duly executed, they are revocable by a will not so executed ; for the charge upon the land was only for the deficiency of the personal to answer the legacies. If the legacies were taken away, the land would not be affected. If they were increased they would affect the real by diminishing the personal, which it was in the power of the owner to do all his life. It was obvious therefore, that the statute of frauds did not affect the question as to legacies, because it did not prevent a man from creating by will, a fluctuating charge upon real, in aid of personal property. But that, said his Lordship, could bear no application to a devise of the land itself, or a reserved part of the realty not disposed of ; nor, as he conceived, to



an original charge upon the land, which he should think could not be revoked by a second informal will. If ever such a case arose, it would be a new question."

A sum of money devised out of land is part of the land in equity, and such disposition is within the statute of frauds.

From *Brudenell v. Boughton*<sup>b</sup>, so often referred to in the above-mentioned case of *Habergham v. Vincent*, we collect the following useful distinctions upon the subject. If a sum of money be given *originally* and *primarily* out of the land, such a devise requires as much the solemnities of execution prescribed by the statute, as a devise of the land itself; because the money is regarded in a court of equity as *part of* the land, since it can only be raised by sale or disposition of part of the land; and this is considered as analogous to the rule of law, that a devise of the rents and profits is a devise of the land itself. And if money be so charged upon land by a will with the due solemnities, a subsequent will unattested, or attested by one or two witnesses only, cannot revoke or subtract the charge. But where land is made subject to legacies generally, such legacies are nevertheless to be considered as primarily attaching upon the personal estate, so that if there are personal assets sufficient, the land will be exempt, for it is only a collateral security; and by a consequence in reasoning, if the will be revoked as to the personalty, the object of the collateral security is gone, and the land remains no longer charged. The legacies given by the first will may be withdrawn by a second unexecuted according to the statute; and by such second will, other legacies may be substituted of a different amount; or, without changing or modifying the legacies first given, additional

<sup>b</sup> 2 Atk. 267;

ones may be given either to the same or different persons<sup>o</sup>.

If money be directed to be laid out in land, the person to whom the *entire* interest in the land would belong under the will, if purchased, may, before the investiture, elect to take it either as money or land, i. e. as personal or real estate. If such devisee makes his will, and describes such interest as money, it will pass without attestation<sup>d</sup>; but without such indication of intention to treat it as money, it remains real, and the will, to pass it, must be attested<sup>e</sup>.

But the person to whom the land, if purchased, would belong, may act upon the fund as real or personal estate.

The great point to be attended to in considering the cases of general charge, is, that by the first will executed to pass and affect real property according to the requisitions of the statute, the land is effectually made an auxiliary and collateral fund to the personal property in respect of legacies; and that to this indefinite extent it becomes a pledge, and impressed with the character of personal estate. But it is to be observed, that if a will, properly attested, contains a direction to sell real estates, and out of the produce to pay legacies, such direction does not so stamp this character of personal estate upon the *whole*, or produce so complete and *ultimate* a conversion of the land into personalty, as that the surplus, after the legacies are satisfied, may pass by an unattested codicil. To produce this effect, the testator ought, in a will executed and attested so as to pass freehold estate, to manifest a clear intention to have the whole actually sold, or, at least, should in such will decidedly shew that he contemplates the surplus as personal estate, and intends to

A direction by will to sell lands for certain purposes, does not so ultimately change the character of the property, as that the surplus, after the particular objects are satisfied, may pass by an unattested codicil.

To effect this absolute conversion, a clear intention ought to be demonstrated.

<sup>o</sup> Vid. *Hannis v. Packer*, Amb. 556.

<sup>d</sup> 3 P. Wms. 221. note c.    <sup>e</sup> Ibid.

bring the *whole* within that description of property. To this limit the cases cited in *Sheddon v. Goodrich*<sup>f</sup>, seem to have carried and confirmed the doctrine. What is not *absolutely* converted, either in law or equity, but is only directed to be sold to answer a particular purpose, as to pay legacies, for which the testator has directed certain conveyances to be made, retains, as to the surplus, its character of real estate : for the particular purpose to which the produce is destined the conversion into personal estate takes place, but as between the personal and real representatives it remains real.

If the object for which the conversion was to be made, does not come into existence, and thus no reason arises for any conversion to answer the purposes of the will, the estate *descends*, in the view of a court of equity, *as real*, to the heir at law.

Such being the doctrine on this subject in a court of equity, it follows, that if, after directing an estate to be sold for the payment of *particular* legacies by a will duly executed and attested, a testator might, by an unattested codicil, dispose of the surplus of his property, either the consistency of the courts of equity, which to other purposes have considered such surplus as real, or the positive restrictions of the legislature, would be violated.

If, therefore, an estate were directed to be sold, and all the debts and legacies generally to be paid out of the produce, it is clear that this would amount only to that sort of general charge which has been so much above considered ; and, though pecuniary legacies generally given by an unattested codi-

cil, would, according to the above principles, attach as charges *secondarily* upon the land, yet the surplus could not *eo nomine* be disposed of by such unsolemn instrument.

But if a testator, by a will duly executed to pass lands, directs the whole of his *real* and *personal* estate to be sold, and out of the produce thereof certain legacies to be paid, and then by an unattested codicil in terms revokes his will, which revocation, from the want of solemnity, can only operate upon the previous dispositions of the personal estate, a very nice and curious question may arise, whether the legacies are to be considered as gone by the partial failure of the fund, or as remaining charged on the real estate. In the above cited case of *Sheddon v. Goodrich*, this was one of the points, and one on which the present Chancellor expressed a painful degree of difficulty and doubt. The distinction stated by his Lordship appears to be in substance as follows :

Where a testator shews both the *real* and *personal* estate to be equally in his contemplation, as the funds out of which the legacies are to be satisfied, a revocation effectual as to the personalty, but insufficient as to the real for want of being attested according to the statute, will leave the *land* still subject to the charge.

Where a testator, in general terms, subjects his real estate to his general legacies, or charges his legacies generally upon his real and personal property, inasmuch as the primary and direct source from which the legacies are to come, will be the *personal* estate (2) the land being regarded in equity as only

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(2) The general rule is clear, that the personal estate is liable in the first instance to the payment of debts. But this general rule supposes, that the engagement upon which the debt arose, was primarily a personal contract; in which case, the personal estate, as having received the benefit, becomes the proper fund out of which the payment should be drawn; so that if money be borrowed, or a debt be any way incurred, and a mortgage made without bond or covenant accompanying it, yet the mortgage makes it no more than

*secondarily and eventually* charged as a collateral security to the personal estate, if the principal fund

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a specialty debt in equity, and the land comes only in aid of the personal obligation upon the simple contract.

The rule also supposes, that it was originally the personal contract of the testator himself, for if an equity of redemption has descended, and then the mortgage is transferred, and the heir covenants to pay the money, and dies ; still as the mortgage was not originally his, the land, upon the second descent, must bear its own burthen, and notwithstanding such personal contract of the immediate heir, his personal assets will, upon his decease, be only *secondarily* liable.

The same doctrine holds if the equity of redemption comes by purchase instead of descent. As it was not originally the debt of the purchaser, his heir will not be entitled to be exonerated out of his personal assets ; and the order of charge will not be varied, if the purchaser should covenant with the mortgagee, for still it was not primarily his own debt, and his personal contract is considered as being only auxiliary ; nor if he covenants with his vendor to save him harmless from the mortgage, for still the purchaser of the equity of redemption is considered as having bought the estate, subject to the charge and with the burthen upon it, to which his covenant has relation as to its principal, and indeed he takes upon himself no more by such covenant than would have been without it laid upon him by a court of equity.

By the majority of the cases, it would appear, that when the debt was originally the debt of the testator his personal assets will not be exempted, except by declaration plain, or necessary implication, contained in, or arising from the will ; and that mere parol or extrinsic evidence cannot be admitted in opposition to the above rule. It is agreed that a testator may, if he please, bequeath his personal estate, as against his heir or devisee, clear of debts, but it is left by the cases somewhat uncertain what mode of expression will suffice for this purpose. However, it is settled, that merely charging the real estate, or even creating a term for payment of debts, is not an exemption of the personal. The personal estate may be said to be first subject. 2. The estates devised for the payment of debts. 3. The estates descended, and this though the

is afterwards withdrawn, the rule of *accessorium sequitur principale* seems to apply; and as the land was charged only to help the deficiency of the personal, this latter fund being *withdrawn*, and not failing through *insufficiency*, the testator must be presumed in law to have altered his will as to the legacies. But where a testator shews an intention to bring the real and personal estates into one fund, by directing a sale of both, and the legacies to be paid out of the produce, he seems to have both funds *equally* in contemplation, and not as in the other case, (according to the construction the law puts upon the intention,) to mean primarily and originally a mere personal gift, to be assisted out of the real property if the personal fails. The distinction runs into great subtilty; but is there any distinction *less* subtle that will reconcile the authorities?

It seems that the effect of the statute of frauds is to prevent the court from *seeing* the intention of the testator to dispose of the real estate (3), if he has not

The court cannot see the intention of the testator with respect to his real property, unless he expresses it by a will executed according to the statute.

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estates are subject to a *general* charge for the payment of debts.

4. Real estates specifically devised, subject to and generally charged with the payment of debts. The Reader will find all the authorities on this subject in Mr. Coxe's note to *Evelyn v. Evelyn*, 2 P. Wms. 659, and the note of Mr. Sanders to *Galton v. Hancock*, 2 Atk. 438, to which may be added the cases of *Hamilton v. Worley*, 2 Vez. Jun. 62. *Woods v. Huntingford*, 3 Vez. Jun. 120. *Buller v. Buller*, 5 Vez. Jun. 517. *Waring v. Ward*, 5 Vez. Jun. 670. 7 Vez. Jun. 332.

(3) Thus in *Buckeridge v. Ingram*, 2 Vez. Jun. 652. the Master of the Rolls (the late Lord Alvanley) observed, "that he *could not read the will* without the word 'real,' in it; but he *could say*, for the statute enabled him, and he was bound to say, that if a man, by a will unattested, gives both real and personal estate, *he never*

done it with the solemnities enjoined by the statute ; for in *Sheddon v. Goodrich*, the codicil declared an intention to make a new disposition of the real as well as the personal ; but as it could only have the effect, for want of execution, of revoking the charge of the personal, the land was construed, notwithstanding the contrary intention expressed, to remain onerated, upon the principle of the distinction above stated, between the case where legacies are charged upon a mixed fund, and where they are wholly issuable out of the personal in the first place, the real estate being meant only to come in aid as a supplemental and secondary resource. And this a testator will be construed to mean, unless he plainly expresses or indicates a contrary intention<sup>e</sup>.

In the case of *Buckeridge v. Ingram*<sup>b</sup>, where a testator, by a will duly executed, gave an annuity to his daughter, charged on all his estates, both real and personal, and by codicil not attested, gave his real and personal estate to his mother for life, the personal estate only was held by this new disposition to be discharged from the annuity ; or, in other words, the annuity was revoked as to the personal estate, but remained a charge upon the real ; and the present Chancellor seems to have approved of that judgment<sup>1</sup> ; who says that “ Lord Alvanley, as he understood upon conversing with him, proceed-

<sup>e</sup> Vide *Ancaster v. Mayer*, 1 Bro. C. R. 454.

<sup>b</sup> 2 Vez. Jun. 652.    <sup>1</sup> 8 Vez. Jun. 500.

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*meant to give the real at all.”* In *Sheddon v. Goodrich*, Lord Eldon noticed the accuracy with which Lord Alvanley expressed himself as to that point.

ed upon this, that it was not the case of a legacy given, as in *Brudenell v. Boughton*, and that legacy altered, modified, or extinguished by a subsequent testamentary paper; but a charge created upon two funds; and the testator, by a subsequent paper, withdrew, not the gift of the thing, but one of the funds, which by the former paper was made liable to the payment of that charge, still leaving a subsisting demand; for, being given out of the real as well as the personal estate, the gift out of the real remained though that out of the personal was gone; not because the thing given was destroyed, but the fund out of which it was given." If the presumption of adding any thing to his Lordship's remarks on the point in *Buckeridge v. Ingram*, may be excused, it might be suggested, that the *power of distress* accompanying the annuity in that case, seemed to mark the real property as an *original* fund in the testator's contemplation for producing the annuity.

In the early case of *Hyde v. Hyde*<sup>k</sup>, which appears to have been the first case upon this subject, Lord Chancellor Cowper observed, that these legacies charged upon land by an unattested codicil, were not devised *out* of the land like a rent, but were only secured by land, which before was well devised. And the same Chancellor clearly held, that a rent out of freehold would not pass but by a will attested by three witnesses. Mr. Justice Buller<sup>l</sup> put the case as to rents strongly thus, "It is clear upon the statute, that a rent cannot pass without three witnesses; for the statute says, '*lands and tenements*,' and a rent

Devise of a rent out of land must be by will, attested by three witnesses.

<sup>k</sup> 1 Eq. Abr. 409.

<sup>l</sup> 2 Vez. Jun. 232.



is a tenement; and if a tenement could pass without witnesses, it would be in direct opposition to the act." Whatever comes properly within the description of a tenement, or, to use the words of the Master of the Rolls in *Buckeridge v. Ingram*<sup>m</sup>, wherever a perpetual inheritance is granted, which arises out of land, or is in any degree connected with, or "exercisable within it, it is that sort of property which the law denominates real, and cannot pass without three witnesses." It seems not to be doubted, therefore, but that tolls<sup>n</sup>, where they are not for terms of years only, navigation shares<sup>o</sup>, commons, the profit of a stallage, petty customs<sup>p</sup>, market, fair, or piscary, which are the subjects of dower<sup>q</sup>, are within the clauses respecting the execution and revocation of wills. But in *Stafford v. Buckley*<sup>r</sup>, Lord Hardwicke held an annuity in fee, granted out of the  $4\frac{1}{2}$  *per cent.* duties, upon goods exported from the West Indies, to be a *personal* hereditament; and in *Lady Holderness v. the Marquis of Carmarthen*<sup>s</sup>, it was held by Lord Thurlow, that an annuity charged upon the post-office, till a sum to be laid out in land should be paid, was a personal annuity; and the inference is, that such property may be passed by a will not attested by three witnesses.

Same doctrine as to tolls, navigation shares, commons, profits of a stallage, petty customs, market, fair, piscary.

<sup>m</sup> 2 Vez. Jun. 663-4.

<sup>n</sup> 2 Blackst. Com. 20.

<sup>o</sup> *Drybutter v. Bartholomew*, 2 P. Wms. 127. *Buckeridge v. Ingram*, 2 Vez. Jun. 652.

<sup>p</sup> *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. *Negus v. Coulter*, Ambl. 367.

<sup>q</sup> Co. Litt. 19, 20.

<sup>r</sup> 2 Vez. 170.

<sup>s</sup> 1 Bro. C. R. 377.

## SECTION VII.

*Attendant Terms.*

TERMS of years will pass (1) by a will unattested ; but terms attendant on the inheritance, are, as to the equitable interest in them, within the statute, though the legal estate is exempt from its operation. The case of *Whitechurch v. Whitechurch*\* will explain this point. Edward Whitechurch took a mortgage of Batcomb Lodge from one Bisse, for 500 years, to commence from the making, for securing the sum of 200l. and interest, and afterwards took another security of the same lands from Bisse, the mortgagor, for 1000 years, in the name of another person, but in trust for himself, to commence also from the making. After this Edward Whitechurch purchased the inheritance of the premises in his own name, and having no wife or issue male, made his will entirely in his own hand-writing, whereby he devised the premises to his nephew, being the son of his younger brother Joseph Whitechurch, for his life, remainder

Terms attendant upon the inheritance are within the statute.

\* 2 P. Wms. 236.

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(1) But they cannot be *created* but by a will attested, because the *creation* of a term affects the *real estate*. The statute of frauds takes notice of all lands devisable by the statute of wills or by the custom of Kent, and which shews that only freeholds of inheritance are within it, for terms of years are not within the statute of wills, nor devisable by custom. *Attorney-General v. Graves*, Ambler 155.

to his son Edward Whitechurch, and to the heirs male of his body for ever, and made his brother, Joseph Whitechurch, his executor and residuary legatee.

It happened that this will, (though intended to be perfected as such) by reason of the testator's sudden death, had no date, nor any name subscribed thereto, nor was the same attested, but the executor had proved it in the spiritual court, and assented to the devise to the nephew ; whereupon the elder brother's daughter, who was heir to the testator, brought her bill, in order to compel the executor and the devisee to assign over the term to her.

It was objected for the defendants, that the executor had assented to the devise, and that the will, though not attested by three witnesses, was, however, good at law to pass this term of 500 years, which was a subsisting term, and not merged in the inheritance, by reason of the intermediate term, and which intermediate term operated as a grant of the reversion, and not as a grant of a future interest, (for it was admitted, that a future interest would not prevent a merger) ; but this grant of 1000 years, being to commence from the making, did pass the reversion for 1000 years ; which was acceded to by the court.

Then if this will would pass the term at law, and was agreeable to the intention of the party, it was said to be very hard that equity should interpose to disappoint the will, especially when it was in favour of so near a relation as a nephew of the testator, and one of his own name, and all this for the sake of one

not more nearly related; and who, on her marriage, would probably change her name. It was furthermore added, that in all cases between volunteers, (as the heir and devisee were here) he that had the law on his side used to prevail.

But it was decreed by the Master of the Rolls, that as this was a term which would have *attended the inheritance*, and in equity have gone to the heir and not to the executor, in which respect it was to be considered *as part* of the inheritance; so the will which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term; that though it was true, such a will as in the present case would be sufficient to pass a term in gross, yet it should not pass a trust of a term attendant on an inheritance. That a will not attested as the statute of frauds requires, should not pass any estate of which the heir, as *heir*, would otherwise have had the benefit. That if the devisee of the land had brought a bill against the executor and heir, to have compelled the executor to consent to this devise, a court of equity would not have decreed it for the devisee; and if so, the voluntary act of the executor's consenting would not alter the case, for at that rate it would be in the power of the executor to make it a good or a void devise, just as he should think proper. Besides, the court observed, that it was the intention of the testator in the present case, not to pass the term *only*, but also to convey the inheritance which was expressly disposed of by the will, to the nephew for life, remainder to his first and other sons in tail. Though as to this, it was said to be extremely hard, that because quite so much as was intended could not pass, therefore, the devisee should be de-

prived of that which might lawfully pass, and which was a less estate than was intended him ; or, because *all* could not pass, therefore nothing should. However, for the above reasons, the court decreed the devisee and executor to join in assigning the term to the plaintiff, the testator's heir at law, but no costs on either side ; this decree was afterwards affirmed on an appeal by the Lords Commissioners Gilbert and Raymond.

When this cause was reconsidered on the appeal before the Lords Commissioners Gilbert and Raymond<sup>b</sup>, Gilbert Baron was of opinion, that this was a term attending the inheritance, and to protect the same from intermediate incumbrances, and that an unmerged term in the same person is in him in nature of a trustee to attend the inheritance, and that it would be very dangerous to all the inheritances in England, if unmerged terms should be taken to be terms in gross in the owners of the inheritances, and pass as such.

Now, in the principal case, if this should be construed a term in gross, then it was such a chattel interest as might pass by the will, though all the solemnities required by the statute were not observed ; but if it was a term annexed unto, and attending the inheritance, it could not pass by this will in any other manner than the inheritance would pass. That it had been allowed at the bar, that the term for two thousand years was annexed to the inheritance, but it was said, that the term for five hundred years was not ; but no reason was given why there should be

<sup>b</sup> 9 Mod. 127.

such a difference between these two terms, that one should, and the other should not attend the inheritance; and certainly it could never be said with any colour of reason, that, where a mortgagee of a term of years purchased the inheritance, that such term, when in himself and unmerged, should go and descend in a course different from the inheritance; for it was the constant and uniform construction in that court, that such a term shall be annexed to, and protect the inheritance, and attend the same; and it would be a dangerous construction in equity to make the inheritance and the term separate and distinct estates in one person\*.

But Lord Commissioner Raymond differed from Baron Gilbert in the view which he took of this doctrine. He was of opinion, that where a term comes to an executor, by implication, as a chattel interest, or to a devisee by a general devise of all his chattels; or where it vests in an administrator, generally, for want of a will; in such cases, the heir at law would be competent to apply to this court to have the term assigned to another, to attend and protect the inheritance; but that, since it was agreed on all hands that the term passed at law, it was a question, whether that court could take it from him to whom it was expressly devised, in favour of the heir at law, who was a volunteer as well as the devisee?

That it was true, where a term was *expressly limited to attend the inheritance*, there, though the testator likewise *expressly* devised it to another, it would not pass; but where it attended the inherit-

\* Et vide *Villiers v. Villiers*, 2 Atk. 71.

ance only by construction or operation of law, or in an equitable notion, as a term brought in and assigned by creditors, or terms raised for children's portions, or for other particular purposes; there, if the testator *expressly* devised such terms, they would pass. For where a man had a term for years, which only by intendment of law attended the inheritance, certainly he had a power to sever such a term from the inheritance; and if he should assign it to one man, and mortgage the inheritance to another, in such case the term should not attend the inheritance, but it became a term in gross; and why should not a man have the like power to do the same thing by will, if he thought fit. But as in that will there was no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance, though there were sufficient words to pass it in general; it was to be considered, whether such *general* words should, after the death of the testator, sever that term from the inheritance, which attended and protected it in notion of equity, before such devise was made.

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down by  
Lord Com-  
missioner  
Raymond  
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White-  
church*.

The distinctions taken by Lord Commissioner Raymond may be more readily understood, by being stated as follows: a term of years may have become attendant upon the inheritance after all the express purposes of its creation are satisfied, by consequence and operation of law; or, after such satisfaction, it may have expressly received this ulterior destination by actual assignment for this purpose. If a term be in the predicament first above supposed, and a person, having in himself such term unmerged, by reason of an intervening reversionary term outstanding, or by reason of the legal estate in the inheritance being in another for his benefit, *expressly* devises the term by

a will capable only of passing *chattel* interests, the term will be severed from its *accidental* connection with the freehold, and will go to the devisee as a beneficial interest, or, in other words, will pass in equity as well as at law. But if it be not so *expressly* devised, the heir at law will be entitled beneficially to the term for the protection of the inheritance; or, in other words, the equity in the term will descend as *a part* of the inheritance for want of an execution of the will sufficient to pass freehold estates.

But supposing such satisfied term to have once received an express destination to attend upon the inheritance, then it seemed to the Lord Commissioner to be immaterial whether it were *expressly* and *by name* devised by the testator, or included under a *general devise of his chattels*, or suffered to devolve to the executor or administrator; it being that judge's opinion, that where such *express* limitation had been made, it would not pass by a will unattested, though the testator *expressly devised it to another*.

The whole of this doctrine of the Lord Commissioner, who delivered his opinion to the effect last above-mentioned, turned upon a distinction between a term assigned upon an *express declaration of trust*, to attend the inheritance, and a term *constructively so attendant* by implication and operation of equity. But the case of *Willoughby v. Willoughby*<sup>a</sup>, has clearly negatived any such distinction between estates expressly made attendant upon the inheritance, and those so considered by construction of equity. And in the same case it was also laid down by Lord Hardwicke,

<sup>a</sup> 1 T. R. 763.



that the term, in *whatever* manner it may have become attendant, may be *disannexed* and turned into a term in gross at any time, by the owner of the inheritance, if he particularizes his intention so to disannex it.

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### SECTION VIII.

#### *Things annexed to the Freehold.*

As to wills affecting things annexed to or growing upon the freehold.

A WILL must operate upon the testator's property according to the state it is found in at his death. Unless an actual severance has taken place in the life-time of the testator, he is incapable by his will, *unattested*, of *devising* the appendages of the freehold, in separation from the subject to which they adhere. And, therefore, according to Perkins, title *Devises*, from whom Swinburn \* has copied the doctrine, those things, which after the death descend to the heir of the deceased, and not to his executor, cannot be devised by testament, except in cases where it is lawful to devise lands, tenements, or hereditaments. So the law stood before the statute of frauds, and so I apprehend it remains in relation to the new requisites to a devise of freeholds introduced by that statute. And this rule extends to things which belong to the realty by simple annexation to the freehold which may not be devised away by a will unattested, unless they were separated before the death of the testator; of which description are doors and windows, and even furnaces, ovens, tables and benches, if fixed and mortised in the earth; and so, in general, are all those

\* Part 3. sect. 6.

appendages of the freehold, which a tenant cannot remove or destroy without being guilty of waste<sup>b</sup>.

If a man seised in fee of lands bequeath, by Trees.  
will sufficient only to carry personal estate, all  
his trees growing upon his land at the time of his  
death, such devise is void. But if he devise away the Corn grow-  
ing.  
corn growing upon the same land at the time of his  
death, such devise will be good by a will unattested.  
The trees are parcel of the freehold till actually severed ; and, unless devised away by a will applicable to freehold, descend, together with the land, to the heir : but the corn which was sown by the testator shall go to the legatee of his personal estate, as goods and chattels<sup>c</sup>. If there is no personal bequest which will apply to it, then an express devise of the lands themselves, though no mention is made of the corn, will give it to the devisee ; as the law holds, in such case, that the intention of the testator was to pass the land, together with its fruits<sup>d</sup>. But if there is neither bequest of the corn, nor devise of the land, it will go to the executor or administrator, and not to the heir<sup>e</sup>.

Thus, it has been always held, that if a man be seised of land in right of his wife, and sow the land, and devise the corn growing thereon, and die before the corn be reaped, the legatee shall have the corn, and not the wife. The reason of the law in which particular is, that the corn is *fructus industrialis*, and he who sows it has a kind of property in it divided.

<sup>b</sup> 4 Rep. 64. and see *Lawton v. Lawton*, 3 Atk. 12.

<sup>c</sup> *Fisher v. Forbes*, 2 Eq. Ca. Abr. 392.

<sup>d</sup> *Winch* 51. *Cro. El.* 61, 461. *Roll. Abr.* 727. and see *Cox v. Godsalve*, 6 East. 604. n.

<sup>e</sup> *Gilb. Evid.* 247.

from the land gained by the *very act of sowing it*<sup>1</sup>. But if one joint-tenant sows the land, and dies before it is reaped, the corn survives with the land (1), because he gained no exclusive property by the act of sowing it; for he had no exclusive property in the land. But if A. seised of land, sow it with corn, and then convey it to B. for life, remainder to C. for life, and then B. die before the corn is reaped, C. shall have it, and not the executors of B. though his estate was uncertain, for the reason of industry and charge fails. And if B. and C. both die, then the lessor who sowed the corn shall have it (2).

Grass and  
herbage.

But the law is otherwise in respect to trees, and also the grass and herbage not separated from the ground at the time of the death of the testator; for this is not *fructus industrialis*; and, therefore, as a tenant for life cannot by a will properly executed to pass freehold estate make any disposition thereof to operate after his death, so neither can the owner of the land in fee simple pass it in separation from the land by a will executed only to pass chattel and personal property. And it will be the same if the na-

<sup>1</sup> Hob. 132.

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(1) Cro. El. 61. Dyer, 316. a. But if one of the joint-tenants occupies the land alone, by the consent of the other, and takes the profits alone to his own use, it seems that if he sows the land, he may devise the standing corn away from the survivor, as *fructus industrialis*, and such devise will be good and effectual, without witnesses; for it is said, that such assent to his sole occupation of the land amounts to a lease at will, and, as such, gives a title to emblements; but such assent by the companion must be express and positive. Cro. El. 314.

(2) Cro. El. 61. For the doctrine as to emblements, see Perk.

tural product is increased by the sowing of hay-seed, or other assistances of cultivation<sup>c</sup>.

With respect to heir-looms (3) which by custom Heir-looms. have gone with a house, they cannot be devised separately *by the owner of the fee simple, even by a will executed to pass freehold estates*; for the will does not take effect till after the death of the testator; and by his death the heir-looms, by ancient custom, are vested in the heir; and the law prefers the custom to the devise<sup>b</sup>.

Deer in a real ancient park, fish in a pond, doves in a dovehouse, and things in the like situation, though personal chattels, are so appropriated to the inheritance that they accompany the land wherever it vests, whether by descent or purchase<sup>d</sup>: and so the charters, court rolls, and muniments of the estate, pass together with the land<sup>k</sup>. In like manner monuments, coats of armour, ensigns, and escutcheons, go to the heir in the nature of heir-looms: but the owner may, *during his life*, sell and dispose of these things if he please, as he may of the trees on the estate; and he is at liberty, as being complete owner, to do any injury to them without being accountable.

Pictures, plate, books, and furniture cannot be

<sup>c</sup> Co. Litt. 185. b.    <sup>b</sup> Roll Abr. 727.

<sup>d</sup> Co. Litt. 8.    <sup>k</sup> Bro. tit. chattels, 18.

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sect. 530. Co. Litt. 41. 45. Hob. 132. Roll. Abr. 727. Gilb. Evid. 246. Com. Dig. tit. Biens, G. 1. c. 2.

(3) *Loom* is a word of Saxon original, signifying limb or member. Spelm. Gloss. 277.

perpetuated in a course of descent, or made to go with the family mansion. When they are left, as is often the case, to be enjoyed by those who shall be in possession of the family residence, as far as law or equity will permit, the absolute interest, subject to the interest for life which may be created in them, will vest in the person who is entitled to the *first* estate of inheritance, whether in tail or in fee, and upon his death will devolve upon his personal representatives<sup>1</sup>.

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## SECTION IX.

### *Mortgages.*

Mortgages, in equitable consideration, are not within the clauses respecting wills in the statute of frauds.

WE have seen, a little above, in the case of attendant terms, an instance wherein chattel interests in land, though devisable *at law* by a will not executed and attested according to the statute, are from the particular view taken of them in courts of equity, deemed by those tribunals to be as much the objects of the requisitions of the statute as estates of inheritance. The converse of the doctrine holds in respect to *mortgages*; this interest being regarded in courts of *equity* as entirely *personal*, a will unattested seems clearly to be capable of passing the beneficial right to the land; so that the devisee, under such a will of the land mortgaged, would be permitted by the court to use the name of the heir to compel payment of the money, or make the pledged estate his own by fore-

<sup>1</sup> 1 Bro. C. C. 274. 3 Bro. C. C. 101., and see the Note subjoined to the Precedent in the Appendix where this provision occurs.

closure. In equitable contemplation the *estate* in the land remains in the mortgagor, while, in respect to the interest of the mortgagee, the land takes the character of personalty as following the nature of the debt, to which it is a collateral security; in so much that if a mortgagee, after making his will, forecloses the mortgage, or obtains a release of the equity of redemption, the mortgaged lands will not pass inclusively, under the general words, lands, tenements, and hereditaments, contained in the will, but will go as an *acquisition*, or *purchase* subsequent to the will, to the testator's heir at law <sup>a</sup>.

In the consideration of equity, therefore, mortgages do not seem, as to the beneficial interest, to be within the words 'lands and tenements,' in the fifth clause of the statute; nor will such interest in general pass by a devise of lands, tenements, and hereditaments (1). But if a mortgagee by

<sup>a</sup> Vide *Casborne v. Scarfe*, 1 Atk. 605. *Sir Litton Strode v. Lady Russell*, 2 Vern. 621. *Winn v. Littleton*, 1 Vern. 3. 2 Vent. 351. 3 P. Wms. 62.

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(1) 2 Vern. 621. L. being seized of several manors and lands, and also of mortgages in fee, which were forfeited, and of a great personal estate, having no issue, made his will, and after devising part to his wife for life, and other legacies, "gave all other *his lands, tenements, and hereditaments*, out of settlement, to his nephew." And one of the questions in the case was, whether these mortgages passed by the will under the general words, *lands, tenements, and hereditaments*? It was held by the Lord Chancellor, the Master of the Rolls, Lord Chief Justice Trevor, and Justice Tracy, that the mortgages in fee, though forfeited when the will was made, did not pass by these general words. But the decree in that case, as it is stated in the Register's book, B. 1707, fol. 510, takes no notice of any mortgages, except those whereof the testator,

his will *expressly* devises the *mortgaged lands*, or makes a general devise of his lands, having only mortgaged lands, it should seem, that the interest in the *money* is hereby carried to the devisee, and the right in equity to the land, as the pledge, accompanies, although the will be not attested.

It is clear that the mortgagor cannot pass his equity of redemption by a will unattested; and if the mortgagee were also under the same restriction, the statute would cut two ways, and equity would be inconsistent with itself, in as much as such double operation of the statute would imply the existence of the real estate at the same moment in two persons distinctly. The truth seems to be, that the mortgagee's interest is contemplated in this court rather as a *right* than an *estate*, while the equity of redemption has rather the quality of an *estate*, than a *right*. Thus it was said by Lord Hardwicke, that in the eye of a court of equity, the equity of redemp-

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after making his will, had purchased the equity of redemption. The case of *Winn v. Littleton*, 1 Vern. 3, affords a *particular* ground for construing the mortgaged lands out of the general words. And according to Reg. lib. 1680, fol. 452, the decree leaves it equivocal, whether the party directed to convey was devisee or heir:

Upon the whole, there seems to be no good ground for holding mortgaged lands *not* to pass by the general words uncontroled in their effect by inference from the particular dispositions. At the same time it is to be remembered that the case *ex parte Bowes*, stated in the note to *Casborne v. Scarfe*, 1 Atk. 605. edit. Sandd. has been denied in later cases; and the doctrine seems now settled that the *intent* may restrain the *generality* of the expression. Vid. *But. Co. Litt.* 203. b. n. 96. and *Duke of Leeds v. Munday*, 3 Vez. jun. 348. Where the devise is to executors, or trustees, for paying debts, the intent is promoted by construing the mortgaged lands to pass. Vid. *ex parte Sergison*, 4 Vez. jun. 147

tion was the fee simple of the land<sup>b</sup>, and though Sir M. Hale called it an equitable right, yet he added, that it was inherent in the land, binding all persons coming in the post, or otherwise (2).

1 Bl. Rep. 145.

(2) Hard. 469. Yet there are bounds to this doctrine of transmutation of estates, in the equitable notion of a mortgage. Thus, if it were applied to the statute of mortmain, it would be opposed to the obvious purposes of the legislature in the provisions of that law. It was, therefore, determined by the Master of the Rolls (Sir John Strange) in the *Attorney-General v. Meyrick*, 2 Vez. 44. that where a mortgagee in possession devised the benefit of his mortgage to a charity, it was within the mortmain act. And his Honour would not allow the distinction attempted to be made on the part of the relator, between a devise of the mortgaged premises, and of the money due on mortgage. Nor did the circumstance of the mortgagee being in possession under an *habere facias possessionem*, seem to weigh at all in the case, the reason of the determination being, that the devisee would acquire a right of making the pledged estate his own by foreclosure, unless the money were paid. His Honour observed, that by a gift of all one's mortgages to A., the whole beneficial right passes to him; and be the legal estate either in the heir, or executor, each would be considered as a trustee for A., who would be permitted by the court to use their names, to get the money, or make the pledged estate his own by foreclosure. If it would be so in that case, then would it be equally so, though the devise was, in phrase, of *money due on mortgage*; where, unless the Court construed it to pass the whole interest of the mortgagee, it would be in effect a void devise. It had been rightly compared to a devise of rents and profits, by which the land itself would pass. Such a construction ought to be made by the court, as would be most effectual to repel the mischief, and advance the remedy. Therefore, if this devise tended to let in the mischief intended to be prevented, it was the duty of the Court to guard against its taking effect. He was of opinion, that the devise came within the express words and plain intent of the statute; the design of which was to lay a restraint on every method, whereby land might possibly come to such hands,

But this equitable consideration of a mortgage, as personal estate, is not permitted to narrow the effect of the statute of mortmain.



## SECTION X.

*Election in Equity.*

An unexecuted will is not even of force to raise a case of election against a person taking a benefit in the personal estate by the same will.

IT is to be observed, that a will of real property, not executed and attested as the statute directs, is classed among those acts which the law holds *to all intents and purposes void*; so that neither courts of equity nor law will pay regard to the intention of the testator, unless he has given it effect in the manner dictated by the legislature. Upon this principle such unexecuted will is not even of force in a court of equity to raise a case of election against a person taking a benefit in the personal estate\*. In *Hearle v. Greenbank*<sup>b</sup>, D. W. devised all his freehold, copyhold and real estate, whatsoever, and wheresoever, and all his leasehold estate, to two trustees, their heirs, executors, administrators and assigns, in

\* 7 Vez. jun. 372.

<sup>b</sup> 1 Vez. 198.

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unless by the manner therein prescribed; but seeing that it would not sufficiently answer the intent of the legislature if confined to land, it adds a prohibition as to personal estate, that it should not be given to be laid out in the purchase of lands. But was there no other way whereby the interest in land might come to a charitable use? Money due on mortgage was a charge and incumbrance on the land, the payment of which depended on the pleasure and ability of the mortgagor; therefore, parliament had by express words taken in that by a third clause; the words of which, if they did not extend to mortgages, he was at a loss to know for what purpose they were put in. The meaning was; that you shall not give to a charitable use that which is or *may be* a charge upon land, though not so at the time of the gift.

trust, to apply the residue, after paying their own charges to the separate use of his daughter M. W., a married woman, during her life, to be at her disposal; not subject to the debts or controul of her husband; her receipts to be good, and to be permitted by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estate, as she should think fit; and he gave to the same trustees, whom he made joint executors, his personal estate, in trust, for the sole and separate use of M. W., and to be at her disposal, and not subject to the debts or controul of the husband. M. W., then under the age of twenty-one, but above seventeen, made her will, and thereby, in pursuance of her power in her father's will, gave 8000*l.* to her daughter Mary, when she attained the age of twenty-one; she then devised the residue of her real and personal estate to the plaintiffs, the two Hearles, their heirs, executors, and administrators, for ever.

The bill was brought by the plaintiffs to have the appointment made by M. W. of the real estate in their favour established; but the court considering the will to be void by reason of the nonage of the mother, adjudged it a bad execution of the power. Then the question arose, whether the heir at law could take the legacy of 8000*l.* under the will, which was well devised, (the testatrix being of a capacity to dispose of personalty), and at the same time claim the lands by descent, against the appointment, or was put to an election, upon the rule of not disputing a will in any part under which you claim. And the case for the heir was thus put at the bar. It was said, that the rule was true, when properly understood,

that wherever a person claims under a will, and by the same will, *properly executed*, land or any thing else is devised to another, which the testator had not a title to, the person claiming under the will shall not dispute the title ; since the will manifests the intent how the whole should go ; but that this rule did not go to make good what was in effect *no will* : that the case under consideration was one in which there was *no will* ; it was not the case of a will impeached for want of title in the testator ; it was like a devise to a charitable use, since the statute ; it was not want of title, but want of capacity to make any will at all of real estate.

To this distinction the Chancellor seemed to accede. His Lordship observed, that as to the equity of the plaintiffs from the claim of the 8000*l.*, it was true, it was determined in *Noys v. Mordaunt*<sup>c</sup>, that if lands in fee were given to one child, and to another lands entailed, it is meant they should release to each other, and the court had gone farther since—to the case of a personal legacy. But still he was of opinion, that this differed from all those cases, and that the heir at law was not obliged to make her election, for in the case before him *the will was void* ; and that where the obligation arose from the *insufficiency of the execution*, or *invalidity* of the will, there was no case where the legatee was obliged to make an election ; for there was *no will* of the land.

And his Lordship put the case of a devise by a testator of a legacy to his heir at law, and of the real estate to another ; where, if the will be

*not executed according to the statute of frauds* for the real estate, the court will not oblige the heir at law, upon accepting the legacy, to give up the land. That such a case differed from *Noys v. Mordaunt*, in the reason of the thing; there the testator devised some lands which were, and others which were not, his own; and the court said, that the devisee should suffer the lands to pass, as if they were the devisor's own. But in the principal case, whether the lands were the testator's own or not, they could not pass by the will.

But in *Boughton v. Boughton*<sup>a</sup>, a distinction was taken as to this point, by the same Chancellor who determined *Hearle v. Greenbank*, which has been recognized and confirmed by subsequent authorities, though with some remarks upon its refinement and subtilty. In this case of *Boughton v. Boughton*, it was held that a legacy to an heir, *upon the express condition* that he did not dispute the will, would put the heir to an election, either to accept the legacy, or the lands devised away, although the will was not executed according to the statute. The case was as follows: A freeman of London devised his real estate to his younger son, Stephen Boughton, and all his personal estate among his children; among the rest, 1,200*l.* upon some contingencies to Grace, the daughter of his eldest son; adding this clause, “if any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute, or controvert the whole, or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the

But if in such unexecuted will there is a legacy to the heir, upon condition that he did not dispute the will, he is put to his election.

<sup>a</sup> 2 Vez. 12.

whole, and all and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as it relates to them severally, shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of the personal estate I die possessed of; revoking what I gave to them, I give it to my residuary legatees;" the testator underwrote to this instrument an attestation in the common form, but it was not subscribed either by himself or by any witness: there was a codicil, without date, but signed by him, therein taking notice of and reciting, that in further consideration of this his last will, he made a codicil thereto, and gave directions therein.

Grace, by the death of her father, became heir at law to her grandfather, and so entitled to whatever he left to descend, or which ought to descend, from the invalidity of his disposition. She being an infant of tender years, this bill was brought by Stephen, the youngest son of the testator, and devisee of his real estate, in order that she might make her election, whether she would have the 1,200*l.*, or the land which happened to descend to her; for that she could not claim both; but, if she chose the legacy, she must let the real estate go according to the intent. The point is so particular, and the Chancellor's judgment so luminous and discriminating, that I have thought it best for the reader to lay it before him at some length.

His Lordship said, he was satisfied that the infant ought not to take the benefit of the personal legacy, without at some time or other waiving any right to the descended lands; and that it was very different from

*Hearle v. Greenbank.* The testator had made one instrument, in which he had used words, expressions, and clauses, relative both to real and personal estate; and in it was contained a clause, importing in words, though not by force of the instrument, to be a devise of the real to the plaintiff, giving 1,200*l.* to his grand-daughter, and taking upon him to dispose of his whole personal estate among his children, who would not be bound thereby, as he was a free-man. He then added the express clause which was the sole ground of distinction between this and other cases; and in the codicil, took notice of that very instrument as a will. The codicil was signed, and put that difficulty, which otherwise might have arisen from the imperfection of the instrument, out of the question. But notwithstanding this, it was a will only by force of the instrument, to pass *personal* estate; for neither the will or codicil was so executed as to pass real estate.

The plaintiff insisted, that the defendant, having a legacy by the will, which was undoubtedly good, should have no benefit thereof, unless she suffered the disposition of the land to take effect. In *Noys v. Mordaunt*<sup>o</sup>, (which was the first case) the testator was disposing of land. The subsequent cases, till *Streatfield v. Streatfield*<sup>f</sup>, were all of a devise of real estate. Had the rule gone no further, but been confined to real estate, this objection had never risen, because the instrument must be effectual, as well to one real estate as another; so that if they had both been real estates, this difficulty could never have arisen so as to make the point come into question. Lord Talbot

<sup>o</sup> 2 Vern. 581.

<sup>f</sup> Cas. Temp. Talb. 176.

went so far as, where the will comprised both real and personal estate, and the land, to which one child was entitled in tail, was thereby given to another, and a personal legacy to the tenant in tail, to consider it as an implied intent, that whoever took by that will, should comply with the whole ; so that he put the party to an election ; but neither in *Jenkins v. Jenkins*, nor in *Streatfield v. Streatfield*, was there a question of the *defect of the instrument*.

Then came *Hearle v. Greenbank*, which was the first case, in which the difficulty arose upon the *defect of the instrument*. In which case his opinion was, that there was no ground for the court to imply a condition to abide by a will of land, when there was, in fact, no will ; and that it would be dangerous to break in upon the statute of frauds, by making an estate to pass by an instrument not sufficient to pass real estate ; and *that*, not by the words of the testator, but by a condition implied by construction of the court ; therefore, it could not be, nor was it warranted by any precedent, for it was only guessing at the intent of the testator, who might leave it with that very view. But the question was, whether the case before him did not differ from that by reason of the express clause in the will. It had been very candidly admitted, that if there was no devise of a real estate, but a personal legacy was given on an express condition, that the legatee should not enjoy it, unless within a certain time he conveyed a real estate, whether coming from the testator or not, he should not enjoy it but on those terms ; the lands not passing by force of the will, but by the operation of the particular clause stipulating the condition. The legatee had it in his power either to part with the land, or

not; if he chose not to part with the land, he forfeited the condition ; for any lawful condition might be annexed.

The case might be put a little farther, his Lordship said, (though it was almost the same as the present) as, suppose in the same instrument there was a devise both of real and personal estate, the will executed only to pass the personal, and not the real ; but a condition annexed that the personal legatee should permit the same persons, to whom the land was given, to hold to them and their heirs : the condition annexed would take place, though the devise was void as to the lands according to the statute of frauds ; for the legatee could not take it in contradiction to the testator's words ; and the devise in the principal case amounted to the same, as if the testator had annexed a condition to permit Stephen to enjoy the land. The court must put a reasonable construction, which was, that none of the devisees should receive any benefit by the will, unless they suffered the whole instrument to take effect ; not having regard to the validity or force of it, according to the statute of frauds, but to the clauses and expressions used. In *Hearle v. Greenbank*, there was no condition expressed in the will ; it rested singly on the construction the court was to make, upon the implied condition that those claiming benefit by it should suffer the whole to take effect ; and then it must necessarily refer to the validity of the will ; for it was rightly argued, that the will could not be read so as to support a disposition of real estate, not being an instrument for that purpose.

In that case, when the court was to make such a construction by implication from the force of the in-



strument itself, the court must see the will, and could not take notice that it was a will of real estate; but in the case before him, where there was such a condition annexed to a personal legacy, the court must consider every part of that legacy, whether it had relation to real estate or not. You must read the whole will respecting the personal legacy, let it relate to what it will; which was a substantial difference, his Lordship said, and would prevent his going so far as to break in upon the statute of frauds, and at the same time would attain natural justice, which required, as far as might be, such construction to be made, otherwise the intent of the testator might be overturned.

But as there might be a difficulty how to carry the will into execution, (for being an infant of tender years, she could not judge for herself, nor could the master judge for her, it being on several contingencies, so that until she came of age, no election could be made,) his Lordship said, the plaintiff must till she attained her age receive the rents and profits of the estate, subject to further order of the court, but must be restrained from committing waste. If the infant should elect to have the land, then whatever the plaintiff should be entitled to as his orphanage part of the testator's personal estate, would be liable to make satisfaction for what he should have received out of the rents and profits of the real, as the court should direct.

The distinction taken by Lord Hardwicke, between the cases of *Hearle v. Greenbank*, and *Boughton v. Boughton*, was recognized and adopted by Lord

Kenyon, in *Carey v. Askew* (1), and of which the Chancellor gave the following account, as to the point now under consideration, from his own note. "I have looked at my own note of *Carey v. Askew*. Lord Kenyon there said, the distinction was settled, and was not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will, under an *express condition* to give up a real estate, by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election, and he could not take the legacy without complying with the express condition. But Lord Kenyon also took it to be settled, as Lord Hardwicke has adjudged, that, if there was nothing in the will, but a mere devise of real estate, the will was not capable of being read as to that part; and unless the legacy was given so that the testator said expressly, that the legatee should not take, unless that condition was complied with, it was not a case of election. The reason of that distinction, if it were *res integra*, is questionable."

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(1) The case is reported in 2 Brown, C.C. 58; but the point under consideration in the text only appears to have made a part of it, by the notes of it referred to by the counsel for the heir at law, and by the Chancellor, in *Shedden v. Goodrich*, 8 Vez. jun. 481.

## SECTION XI.

*Signature and Subscription..*

Of the signature of the testator, and the subscription of the witnesses.

IT shall be my next business to enquire into the state of the law on the essentials held requisite in regard to the signature of the testator, and the subscription of the witnesses. The formalities required are, 1st, that the will be in writing;—2d, that it be signed by the deviser, or some other in his presence, and by his direction;—and 3d, that it be attested and subscribed in his presence, by three or more credible witnesses.

What is a sufficient signing.

If the language made use of by the legislature, were to be understood in its natural and usual sense, it would seem that there could be no great contention in regard to the meaning of the words 'shall be signed by the deviser,' which are generally considered as importing the actual and formal subscription of the name of the party at the bottom of the instrument. And by directing this to be done in the presence of three witnesses, the statute at first view seems to require that the attestators should have ocular evidence of the act of signing performed by the testator.

Very soon, however, after the legislature had thought fit to place these guards about a dying man, in this last and important act, courts of justice yielding to the popular bent towards freedom and facility in all alienations of property, instead of strictly executing the intention of parliament, seem to have studied to frustrate its caution.

In the case of *Lemayne v. Stanley* (1), which was determined about four years after the statute was passed, the solemnity of signing was treated with very little regard. Stanley, seised in fee, wrote his will with his own hand, beginning thus, " In the name of God, Amen. I, John Stanley, make this my last will and testament," and he thereby devised the lands in question, and put his seal, but did not subscribe his name; but three witnesses subscribed the will in his presence. And whether this was a good will to pass land within the statute of frauds was the question. After several arguments, it was adjudged by the whole court, consisting of North Chief Justice, and Wyndham, Levinz, and Charlton, Justices, to be a good will; for being written by himself (2), and his name being in the will, it was a sufficient signing within the statute, which did not appoint *where* the will should be signed, at the top, bottom, or margin, and that therefore a signing in any part was sufficient. And soon after, in the 37th year of the same King, the doctrine was stated still more loosely by Lord Chief Justice Jefferies, who the report\* says, seemed to hold, that a will written all by a testator's own hand, and acknowledged in the presence of three credible witnesses, would be within the intention of

It has been held a sufficient signing if a will be written by a testator's own hand, with his name inserted.

\* Anon. Skin. 227.

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(1) 3 Lev. 1.; and again in the case of *Hilton v. King*, Lord North and Levinz agreed, that it was immaterial, whether the signing be at the top or bottom of the will, for the statute doth not say subscribed, but signed by the testator.

(2) The Emperors Theodosius and Valentinian allowed every holograph testament to be available, though made without witnesses, Novell. Theod. lib. 2. tit. 4.

the statute, though it were not signed by him according to the words of the act. And this doctrine has been acceded to as settled whenever it has since come under consideration. So in *Stokes v. Moor*<sup>b</sup>, the case of an agreement was said to be like that of wills, upon which it was said to have been determined, that the testator's writing his name in the introduction of the will, was a good signing within the statute. And in the late case of *Coles v. Trecothick* (3), Lord Eldon took notice, that it had been often held in respect to wills, that if a testator begins his will with the formal introduction of "I, A. B. do make this my last will," it was a sufficient signing.

But if the testator begins to sign in regular form, and does not complete it, the statute, as it seems, is not satisfied.

In *Right v. Price*<sup>c</sup> there was an appearance of greater strictness. According to which case it appears that if the testator *shows an intention* to subscribe the will in regular form, by beginning to write his name at the bottom, but being overtaken by weakness or incapacity, before he has completed such intention, he becomes incapable of executing his purpose, the will is not sufficiently signed within the act. In that case, a will had been prepared in five sheets, and a seal affixed to the last, and, likewise, the form of attestation was

<sup>b</sup> Dougl. 241.

<sup>c</sup> 1 P. Wms. 771. note and vide supra, 122.

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(3) 9 Vez. jun. 249.—But his Lordship seemed to think, that for this formal introduction to be a sufficient signing, it should be one simultaneous act, and that the whole act or intended instrument should be in the contemplation of the testator at the time of his writing such formal introduction. And in this view it may deserve consideration, how far, if a will be written on different pieces of paper, or at different times, such a formal beginning will be equivalent to a regular signing.

written upon it, and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third ; but being unable from the weakness of his hand, he said, “ he could not do it, but that it was his will.” And on the following day, being asked if he would sign his will, he said, “ he would,” and attempted again to sign the two remaining sheets, but was not able to do it. The case was decided upon another ground, but the Court of King’s Bench seemed to be of opinion, that this was not a sufficient signing ; for the testator, when he signed the two first sheets, had an intention of signing the others ; he did not, therefore, mean the signature to the two first sheets, as the signature of the whole will ; and consequently there never was a signature of the whole, but only a beginning to sign.

In *Lemayne v. Stanley*, the writing of the name in the introduction of the will, was all the signing contemplated by the testator, and as far as such a mode could be held a literal accomplishment of the statute, his intention in respect to his will was completed, his mind being in no suspense, nor looking to any further or future act of authentication. But in *Right v. Price*, the testator expressly announced an intention to authorize the instrument in a regular and solemn way, and therefore his will seemed to be inchoate until this was done : why it was not done was to be explained ; and so the case could only be established by those parol proofs, which it was the object of the statute to exclude.

In the case of *Lemayne v. Stanley*, above cited, three of the judges, including the chief, were of opinion, that the testator, by *putting his seal* to the will, had sufficiently signed within the statute, for they

Whether  
sealing is  
signing.

said that the signum was no more than a mark, and sealing was a sufficient mark that it was his will.

In *Warneford v. Warneford*<sup>a</sup>, which, after a long interval seems to have been the next case in which this question came to be considered, it is said to have been held by Lord Raymond, on an issue out of chancery of *devisavit vel non*, that *sealing* a will was a *signing* within the statute of frauds. We are to observe, that in *Lemayne v. Stanley*, the opinion of the judges must be regarded as spoken *obiter*, the case being decided on the ground of the sufficiency of the insertion of the name in a will, written by the testator; and the point in *Strange*, as stated only in a short note, was agitated at *nisi prius* only. But this doctrine was ill received in the subsequent case of *Smith v. Evans*<sup>c</sup>, wherein Lord Chief Baron Parker, Baron Clive, and Baron Smith, (in the absence of Baron Legg) are stated to have said, that the opinion of the three judges in *Lemayne v. Stanley* was very strange; for that if it were so, it would be very easy for one person to forge another man's will, by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand.

And the same judges declared, that if the same thing should come into question again, they would not hold that *sealing* a will *only*, was a sufficient signing within the statute. The Chief Baron seems to have been less resolved on the same question, in the opinion delivered by him in *Ellis v. Smith*<sup>f</sup>, in which he thus expressed himself: "As to the point,

<sup>a</sup> 2 *Strange*, 764.

<sup>c</sup> 1 *Wils.* 313.

<sup>f</sup> Reported in 1 *Vez.* jun. 11.

whether sealing be signing ; I own I think it is not ; for the character and hand-writing are necessary, and were designed to prevent or detect frauds and impositions. But, however,\* said his Lordship, as in some cases it has been thrown out *obiter*, and in one case decreed, that it is equal to signing, I shall submit my opinion." But Willes C. J. said decidedly in the same case, that he did not think *sealing* was to be considered as *signing* ; and he added, that he declared so then, because, if that question ever came before him, he should not think himself precluded from weighing it thoroughly, and decreeing, that it was not signing, notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters ; for, upon examination, he found that many of the sayings ascribed to that great man, Lord Chief Justice Holt, were never said by him (4).

The opinion of Sir John Strange, Master of the Rolls, was on this point agreeable to that declared by the Chief Justice. He observed, that he was not convinced that sealing was signing ; for sealing *identified* nothing ; it carried no character ; and most seals were affixed by the stationers, who prepared the paper. Lord Hardwicke did not, according to the report, speak, in this case, as to the question of sealing ; but in a case which had been determined by him two years before†, his Lordship had expressed himself in stronger language to the same effect with the Lord

\* *Grayson v. Atkinson*, 2 Vez. 459.

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(4) See Show. 69. *Lea v. Libb*, where Lord Holt is said to have held sealing to be a signing.



Chief Justice Willes and Sir J. Strange : he then declared, that the statute, by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing; then how could it be said, that putting a seal to it, would be a sufficient signing? for any one may put a seal; no particular evidence arises from a seal; common seals are alike; no certainty or guard therefore arises from thence."

Whether making a mark, where the party is unable to write, is a sufficient signing or subscribing.

Till a late case it was a considerable doubt with the profession, whether, if a testator or witness, could not write his name, he might satisfy the statute by making his mark. In *Lemayne v. Stanley*, as it is reported in *Freeman*<sup>h</sup>, it is said that the court were of opinion, that it was not necessary for the testator to write his name, for some cannot write, and then their mark is a sufficient signing. But this opinion, though entitled to great deference, as being stated to have been that of the court and not of a single judge, yet as being uncalled for by the facts of the case, must be regarded as extra-judicial. *Hudson's case*<sup>i</sup>, which was determined about a year after *Lemayne* and *Stanley*, where two witnesses swore that J. S. the testator did not publish the writing as his will, but that A. B. guided his hand, and J. S. made his mark, but said nothing, is too mixed a case to be admitted as an authority to this point.

The observations made by Sir John Strange in the above cited case of *Ellis v. Smith*, on the question as to sealing, do certainly seem as strongly to apply to

<sup>h</sup> *Freem. Rep.* 538. and see 17th *Vez. jun.* 459.

a testator's mark, for it identifies nothing: it carries no character. But in the late case of *Harrison v. Harrison*<sup>k</sup>, it was decided by Lord Eldon, that the attestation of a devise by a mark, was good within the statute; and as the statute requires the attestators to *subscribe*, and the testator to *sign*, it may be thought that the principle of this determination is applicable *a fortiori* to the signature of the testator himself, since the word 'subscribe' seems much more forcibly to point to the actual hand-writing, than 'sign,' which, without any strain upon its grammatical sense, though, perhaps, not without some sacrifice of its popular and usual acceptance, might be deemed to be satisfied by *any symbol* of the testator's consent and ratification (5).

In the above-mentioned case of *Harrison v. Harrison*, the question was made upon a bill by devisees against the heir, whether the will was duly executed to pass real estate according to the statute of frauds, one only of the witnesses having subscribed his name, the two other having attested by setting their marks respectively. Lord Chancellor Eldon observed, that upon inquiry from Mr. Serjeant Hill, he had found, that there was a special case reserved in the Court of Common Pleas, upon the question, whether a will devising real estate was well executed, one of the witnesses being a marksman; and it was held clearly

<sup>k</sup> 8 Vez. jun. 185.

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(5) The counsel for the plaintiff is stated to have adverted to the difference of expression in the statute, with reference to the witnesses and the devisor; and to have remarked the difficulty of making the proof, in case of the witnesses being dead.

sufficient. It was a case of *Gurney v. Corbet*, in 1710, in a note-book, which was the property of Mr. Justice Burnet. His Lordship said, he thought there might have been a great deal of argument upon it originally. But upon this authority the plaintiff must take a decree. In a few months afterwards the same point was determined by Sir William Grant, Master of the Rolls, in *Addy v. Grix*<sup>1</sup>, agreeably to the decision of the Chancellor in *Harrison v. Harrison*, and it therefore seems now to be at rest (6).

It is sufficient if the witnesses attest upon the acknowledgment by the testator of his signature, without seeing him actually sign.

It seems to be fairly inferrible from the decision in *Lemayne v. Stanley*, that the court were of opinion, that it was not necessary that the witnesses should attest the very act of signing, but that an acknowledgment by the testator, that the act of signing was done by him, was sufficient for them to attest ; for since not the sealing, but the writing over the will, with the testator's name in it, was the ground of the decision, the witnesses must have seen this done, if it was judged insufficient for them to attest upon the acknowledgment of the testator ; but this was not so found by the jury, or it would have put an end to all controversy upon the case ; and if the witnesses did

<sup>1</sup> 8 *Vez. jun.* 504.

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(6) According to the report of the case of *Lemayne v. Stanley*, in *Freeman*, the court were of opinion, that if the testator had his name on a stamp, it would be enough if he impressed his name instead of writing it. And in *Strange v. Barnard*, 2 *Bro. C. C.* 585. it was held, that stamping was equivalent to sealing. By the civil law, if a testator could not write, he was not admitted to make his mark, but an eighth subscribing witness (seven being the ordinary legal number) was called in to subscribe in the place of the testator. *C. 6. 23. 1.*

not attest the writing of the whole will by the testator, their attestation could only go to his acknowledgment of his signature. This point, however, seemed to exist in some doubt during a long time after the statute was passed. In *Dormer v. Thurland*<sup>m</sup>, where the will was not signed by the testator in the presence of the witnesses, but he acknowledged it to be his hand, and declared it to be his will in their presence, Lord Chancellor King inclined to think that the will was good, but ordered the point to be reserved, and made a case for further consideration (7).

However, in a case<sup>n</sup>, which came before the Master of the Rolls (Sir J. Jekyll) a few years afterwards, the will was held good, though the witnesses did not see the testator sign it, but he owned it before them to be his hand. And the reporter adds, that on his mentioning this opinion of the Master of the Rolls to Mr. Justice Fortescue Aland, he said it was the common practice; that he had twice or thrice ruled it so upon evidence on the circuit; and that it was sufficient if one of the three subscribing witnesses swore that the testator acknowledged the signing to be his own hand-writing.

Sir Joseph Jekyll had delivered a similar opinion, a little before, in a case of *Smith v. Codron*, cited by

<sup>m</sup> 2 P. Wms. 506.

<sup>n</sup> *Stonehouse v. Evelyn*, 3 P. Wms. 252.

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(7) But the judges of B. R. on argument held the will void, as a charge, for want of being sealed according to the direction of the power.

Lord Hardwicke, in *Grayson v. Atkinson* \*. In that case A. had signed and published a will in the presence of two persons who had attested it in his presence ; then a third person was called in, and the testator, shewing him his name, told him that that was his hand, and bid him witness it, which he did, and subscribed his name in the testator's presence ; and the testator, two hours after, told him that the paper he had subscribed was his will. His Honour held this to be a good execution.

But in the instructive case of *Grayson v. Atkinson*, above referred to, this point came fully under the consideration of Lord Hardwicke. The bill was to establish a will against an heir at law, who, by his answer raised the doubt, whether, as all the witnesses did not see the testator sign, though *he saw them* all sign, this was a good attestation within the statute. The Chancellor, adverting to the argument of the counsel for the defendant, in which they had insisted that the word '*attested*' superadded to '*subscribed*,' imported that the attestators should witness the very act of signing, and that the testator's acknowledging that act to have been done by him, and that it was his hand-writing, was not sufficient to enable them to attest, but that it should be an attestation of the thing itself, and not of the acknowledgment, observed "that certainly there must be an attestation of the thing in some sense, but the question was, whether, if they attest on the acknowledgment of the testator that that was his hand-writing, that was not an attestation of the act, and whether it was not to be construed agreeably to the rules of law and evidence,

according to which all other attestation and signing might be proved. At the time of making that act of parliament, and ever since, if a bond or deed was executed and signed, and afterwards the witnesses were called in, and before the witnesses, the person making it, acknowledged the signature to be his hand-writing, that was always considered as an evidence of signing by the person executing, and was an attestation of it by them.

“It is true,” said his Lordship, “there is some difference between the case of a *deed* and a *will* in this respect, because signing is not necessary to a deed, but sealing is ; and I do not know that it was ever held, that acknowledging the sealing without witnesses has been sufficient (8). But, nevertheless, that is the rule of evidence in respect to signing. If it were in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument be attested by witnesses, proving that they were called in, and that the party took up the instrument, and said, that was his hand, such would be a sufficient attestation of the signing by him. That is the rule of evidence. Considering, therefore, the words of the act of parliament, it seems, that if the testator having signed the will, did, before the attestators, declare and acknowledge he had so done, and that the

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(8) But if the hand-writing to a deed be proved, the sealing and delivery may be presumed : if, therefore, the signature to a deed be acknowledged to an attestator, the rest seems to follow, see *Grellier v. Neale and others*, Peake, Ni. Pr. Ca. 146. See also *Parke v. Mears*, 2 Bos. et Pull. 217.

signature was his hand, that might be sufficient to make the attestation good."

The case of *Ellis v. Smith*<sup>p</sup>, came on in 1754, which was about two years after *Grayson v. Atkinson*, and here the Lord Chancellor Hardwicke was assisted by Sir John Strange, Master of the Rolls, Willes Chief Justice of B. R. and Parker Chief Baron. The form in which the question is reported to have been put, was, whether a testator's declaration before three witnesses, that it was his will, was equivalent to signing it before them, and constituted a good will within the 5th section. The determination of *Grayson v. Atkinson* by Lord Hardwicke, was in this case mentioned by the Master of the Rolls, as an authority full to the point upon the first question; and his Honour said, that to determine otherwise at that time, would introduce confusion and uncertainty, and sap the foundation of much property which rested on former decrees.

The court was unanimous, in holding such acknowledgment by a testator to the attestators of his will, to be good within the statute; and the Chief Justice declared, that his opinion was virtually supported by those cases which had decided the attestation and subscription of the witnesses *at different times*, to be good; for then, a testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two; and why should not his acknowledgment to the three be equally good? The Chancellor also observed that those cases supported the one before him from their *direct similitude*, and

<sup>p</sup> 1 Vez. jun. 11.

not from any consequential reasoning ; for he apprehended that the determination in all those cases was grounded on this, that a declaration by the testator was good ; for if he signed three times, there were three executions, and none could be good within the statute (9).

The late case of *Addy v. Grix*<sup>a</sup>, shews it to be the present sense of the courts, that this point is settled. The bill was filed to carry into execution a devise of real estate in trust to be sold. One of the witnesses, by his depositions, stated, that he did not see the testator execute, but that the testator took the will in his hand, and said the will, and also his name, were of his hand-writing. The Master of the Rolls, without difficulty, admitted the sufficiency of the attestation.

<sup>a</sup> 8 Vez. jun. 504.

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(9) The reporter has added a *note*, wherein he questions the propriety of this dictum of Lord Hardwicke, which had first fallen from the Lord Chief Justice ; observing that it was hard to say that such declaration or acknowledgment would be sufficient in any case where *actual signing* would not do. But it is to be observed, that the acknowledgment or declaration is not supposed to stand in the place of, or be equivalent to a distinct act of signing, but to give effect to the attestation of the act of signing already done. See the case of *Westbeech v. Kennedy*, 1 Vesey and Beames, 362, to which case a note is added, which, it may be as well to apprise the reader, contains a number of cases not connected with the point in question.



## SECTION XII.

*Formality of Publication.*

THE acknowledgment of the signing to the three subscribing witnesses, seems, according to the principles on which many cases have been decided, to comprise the efficacy of what the law means to express by the *publication* of the will; the manner of effectuating which, was often a judicial question before the statute of frauds. The term itself, *publication*, seems never to have borne any very precise or appropriate meaning, or to have indicated any certain and fixed form. After the statute of wills had established the direct testamentary power, accompanied with the obligation of declaring the will by writing, these parliamentary wills were thought to require a very slight degree of formal publication superadded to the solemnity and durability of writing and the cases shew, that, before the statute of frauds, very little, if any, verbal formality was thought necessary to accompany the written declaration.

Thus, a very few years before the statute of Charles was enacted, it was resolved, in the King's Bench, by the whole court, on a trial at bar in an issue out of Chancery, 1st, that if a man draws up his own will, and sends it to counsel to be advised of the legality of it, this is no will, unless it had a publication after he received it back from his counsel: but, 2d, that if after the will came from the counsel with

alterations made by him, the party put his seal to it, or *subscribed* his name, or wrote upon it, 'this is my will,' though there were no witnesses to it, yet this was a good publication, because by any of those expressions, the testator declared his intent that it should be his will<sup>a</sup>. In *Peate v. Ougley*<sup>b</sup>, Sir John Hollis mentioned a case determined by Lord Shaftesbury, before the 29 Car. 2. in which, though the testator wrote his will with his own hand, and also these words '*signed, sealed and published in the presence of,*' and no witnesses had subscribed it, it was held a sufficient publication. And in the principal case, because these words, *signed, sealed and published in the presence of,* were written at the top of the will for want of room below, in the testator's own hand, and then the names of the three witnesses were subscribed, though one witness (the other two witnesses being dead) deposed, that himself and the other two witnesses were called up in the night, and sent for to the testator's bed-chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence, but *without seeing any of the writing, or being told by the testator it was his will, or what it was,* but that he believed it to be the same paper, because his name was there, and the names of the other witnesses, and he never witnessed any other paper for the testator; this was held to be a sufficient publication of the will, after the statute of 29 Car. 2. In *Ross v. Ewer*<sup>c</sup> Lord Hardwicke mentioned a case of a Mr. Windham in the court of K. B.

<sup>a</sup> *Bartlett v. Ransden, et al.* Trin. 15 Car. 2. B. R. Vin. Abr. tit. Dev. (N. 2.) pl. 16.

<sup>b</sup> Vin. Abr. tit. Dev. (N. 7.) pl. 12.

<sup>c</sup> Atk. 161.

which was a trial at bar, upon the will of his uncle, wherein the only question was whether the testator *published* it ; there was no doubt of his having executed it in the presence of three witnesses, or of their having attested it in his presence ; which shewed, his Lordship said, that *publication* is, in the eye of the law, an *essential* part of the execution of a will, and not a mere matter of form.

The point therefore seems subject to some doubt, whether *publication* is to be considered as a mere vague term, expressing generally the act of authenticating and announcing the veritable will of a testator, but depending as to the mode by which it is to be effectuated on the particular ceremonies and solemnities prescribed by the legislature, or as implying a specific obligation upon the testator *beyond* the execution and attestation of the will according to the statute of frauds. If any positive declaration by the testator that it is his will, be necessary to constitute a sufficient publication since the statute, it does not seem that the mere acknowledgment of the signing can operate as an equivalent ; for the *acknowledgment* of the signing, unless the testator at the same time acknowledge his will, cannot be more extensive in effect than the *act* of signing in the presence of the witnesses. Upon the whole, however, we are to consider that, great as is the weight of Lord Hardwicke's opinion, it was delivered on this point in *Ross v. Ewer*, gratuitously and extrajudicially ; whereas the cases of *Peate v. Ougley*, *Trimmer v. Jackson*, *Stonehouse v. Evelyn*, and others, which have been cited for the contrary doctrine, are direct authorities.

## SECTION XIII.

*Wills interrupted and resumed.*

IT is established by the agreement of all the cases, that a testator may make his will at different times, if the subsequent writing takes up and continues the former ; and it matters not by how long intervals these acts are separated ; they will compose one entire instrument, if the first purpose appears to have proceeded to its accomplishment, though with many pauses and resumptions. Thus\*, where an illiterate person made and signed his will, in which there was a devise of lands, and at a subsequent period added more to it *on the same sheet of paper*, and declared that he did not thereby mean to disannul any part of his former devise and disposition, and signed it, and then took the sheet of paper in his hand, and declared it to be his last will and testament in the presence of three witnesses, and desired the witnesses to attest it, which they did in his presence, this was held to be one entire will, though made at different times, and to be attested agreeably to the statute of frauds ; or, in other words, the additional writing was held to be part of *one entire will*, and not a *codicil*, and the execution and attestation to be an *original* publication, and not a *re-publication*.

A will, though it be proceeded in at *different times*, and often suspended and resumed, will need only one execution.

But where the will was written on different pieces

\* *Carleton v. Griffin*, 1 Burr. 549. *Carth.* 37. *arguendo*, and, as it seems, agreed to by *Dolben, J.*

Of the execution of a will written on different pieces of paper.

of paper, it was holden, that the witnesses ought to see *all* the pieces of paper, or the will was not properly attested. Thus, in ejectment<sup>b</sup>, where the special verdict set forth, that J. D. made his will in 1670, with two witnesses who subscribed their names in his presence ; and in 1679, made a codicil, and thereby confirmed his will in what was not altered, and inserted some new bequests, and there were two witnesses to it, one of whom had witnessed the will, and the other was a new one, the only point was whether these made together three witnesses to the will, to satisfy the statute of frauds ; but the court decided against the devise, because the third witness was not a witness to the first will. There was no entire instrument attested by three witnesses (1). And if the additional writing

<sup>b</sup> 2 Mod. 263.

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(1) The reader should compare this case of *Lea v. Libb*, with *Bond v. Seawell*, 3 Burr. 1773. Blackst. 407. 422. 454. in which latter case it was proved, that C. made his will, consisting of two sheets of paper, all of his own hand-writing, and signed his name at the bottom of each page ; and that he also made a codicil of his own hand-writing upon one single sheet, and then called in H. and shewed him both the sheets of his will, and his signature to every page thereof, and told him that *that* was his will, and then he shewed H. the codicil, and desired him to attest both the will and codicil : which he did in the presence of the testator, and then went out of the room. V. and L. came in immediately afterwards, and the testator shewed them the codicil, and *the last sheet of his will*, and sealed both before them. C. then took each of them up severally, as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but *never saw the first sheet of the will ; nor was that sheet produced to them ; nor was the same nor any other paper upon the table ; both the sheets of the will were found with the codicil in the testator's bureau, after his death ; all wrapped up in one piece of paper ; but the two*

were not a resumption and continuation of the former, but a distinct act and disposition by way of codicil, it might operate as a republication of the will as to lands, if both the will and codicil were attested, respectively, according to the statute ; but if the will were not so executed and attested, the codicil would not help the

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sheets of the will were not pinned together : and the question upon these facts was whether this will was duly executed according to the statute of frauds ?

After three several arguments before the court of King's Bench, and one argument before all the judges in the Exchequer Chamber, Lord Mansfield delivered the judgment. His Lordship said, that the question made at the trial, and submitted by the case, as it stood, turned upon the solemnity of the execution, and they were of opinion, that the due execution of this will could not be come at, in the method wherein the matter was then put ; that if this were considered as a special verdict, they thought *it was defectively found as to the point of the legal execution of the will*. But that every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention, and that they all thought the circumstances sufficient to *presume*, that the first sheet was in the room ; and that the jury ought to have been so directed ; but upon a special verdict, nothing could be presumed ; therefore, they were all of opinion, that it ought to be tried over again ; and if the jury should be of opinion, *that it was then in the room*, they ought to find for the will generally, and they ought to presume from the circumstances proved that it *was* then in the room.

The case of *Lea v. Libb* was also on a special verdict, and, therefore, no facts could be presumed ; but it does not seem that the case afforded the same ground of presumption, as that of *Bond v. Seawell*, in which last case there were *three witnesses*, if any, to the *whole* will, for the question was not as to the complement of witnesses, but whether the *whole* will, (the first sheet not having been seen by them,) was covered by the attestation ; whereas, in *Lea v. Libb*, it was necessary to make the will and codicil

defect, although it had the requisites of the statute, for what was bad in its *creation*, could not be made good by any thing *ex post facto*, and the operation of a codicil, where it is a republication, is only to set up the will in its *original state and efficacy*, making it, *as far as it is efficient in itself by the solemnities of its execution and legal compass of expression*, reach to the date of the codicil, and embrace intermediate acquisitions.

Thus a testator<sup>o</sup> devised his lands to trustees and their heirs, in trust for maintaining and providing for the poor scholars of a college in Cambridge, and for other charities, and the will was written with his own hand, but had no witnesses, and afterwards he made a codicil, which was duly executed and subscribed by four witnesses, wherein he recited and took notice of the will. And one of the questions in the case was, whether the codicil was a good publication of the will within the statute of frauds? It was contended on behalf of the devisees, that the codicil, taking notice of the will, and being duly executed, made the will valid in the same manner as if it had been affixed to the will at the execution thereof, for the law would construe it as a part of the will, and its being laid in a different place signified nothing.

<sup>o</sup> Attorney General v. Barnes, 2 Vern. 597. Prec. in Ch. 270.

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one instrument, before the attestation could be held sufficient, for to neither, and to no part of either, were there three witnesses; and if they were *distinct* instruments, it seems, according to the authorities, that each ought to have been attested by three witnesses, to have been valid within the statute.

But it was held, that the will was void, for though there were three subscribing witnesses to the *codicil*, yet that would not support the *will*.

This difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act, is not difficult to understand as a proposition, though very difficult to explain by example, or apply in practice. Upon this distinction, however, will, it seems, depend the question, whether or not, the *first* act of testamentary disposition will require to be executed and attested according to the statute.

Of the difference between a writing in continuation of a will formerly begun, and a republication.

But whether the *subsequent* writing be considered as a republication by way of codicil, or as the conclusion of something already begun, as in the case just mentioned of *Carleton v. Griffin*, it appears quite clear, upon the principles of *Habergham v. Vincent*, already discussed, and the doctrines of other cases, that such *subsequent* writing to be effectual to pass land, must be executed and attested as the statute directs, in the case of devises of lands.

It was early decided that a will of lands was good where the three witnesses subscribed their names, at several times, without being present at once together<sup>d</sup>. And though the witnesses must subscribe the will in the presence of the testator, it is not necessary that in such subscription *notice* should be taken of the *fact of its having been done in the presence of*

That the subscription of the witnesses need not take notice that they attested in the testator's presence.

<sup>d</sup> Freem. 486. Anon. 2 Cha. Ca. 109. Anon.



*the testator*, for this is not in terms required by the statute ; and whether it be so expressed or not, it must be proved to have been so done, to the jury. The question on a case reserved\* on the trial of an ejectment brought by the heir, for the opinion of the court, was, whether it should be left to a jury to determine, whether the witnesses to a will (*being all dead*) did or did not set their names *in the presence of the testator*, and this merely upon circumstances, without any positive proof ; and the court thought that it was a matter fit to be left to a jury : for they said, the witnesses, by the statute of frauds, ought to set their names in the presence of the testator, but it was not required by the statute, that this should be taken notice of in the subscription to the will ; and whether *inserted* or not, it must be *proved* ; and if inserted, it does not *conclude*, but may be proved *contra*, and the verdict may find *contra*. Then if not conclusive *when inserted*, the *omission* would not conclude on the *negative* side, and therefore, *it must* be proved by the best proof the nature of the thing was capable of. And they further said, that in case the witnesses were all dead, there could not be any *express* proof, since at the execution of wills, oftentimes none are present but the deviser and witnesses. The proof must, therefore, as in other cases, be circumstantial ; and there were sufficient circumstances in the case, 1st, three witnesses had set their names, and it must be intended they did it regularly ; 2dly, one witness was an attorney of good character, and might be presumed to understand what ought to be done. And the question being on a matter of fact, it ought to be left to the

\* Hands v. James, Com. Rep. 531. et seq.

jury, like the question whether livery was given on a feoffment, where no livery was indorsed; and whether a deed was executed, where the counterpart only was produced.

To the same effect was the case of *Croft v. Paulet*, where the words of the attestation were "signed, sealed, published, and declared, as and for his last will, in the presence of us, A. B. and C." And it being objected, that the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one; the court, on the authority of the case of *Hands v. James*, above cited, said it was evidence to be left to a jury, with all the circumstances; and a verdict was given for the will.

The same point was decided in the same way a few years before, by Lord Chief Justice Willes, and the rest of the Court of Common Pleas, in the case of *Brice v. Smith* (3), where also the witnesses were all dead.

<sup>1</sup> 2 *Strange*, 1109.

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(3) *Willes's Rep.* 1. *Com. Rep.* 539. S. C. But the report in *Comyns* seems to be a little inaccurate, in saying, that nothing but the names of the witnesses were subscribed; the attestation being expressed in the same words as in the above-mentioned case of *Croft v. Paulet*, "signed, sealed, published and declared, by the said testator, to be his last will and testament, in the presence of us, &c." See the note of the editor. *Willes* 4. (b.)

## SECTION XIV.

*Qualification of Witnesses.*

IN Hudson's case, reported in Skinner<sup>a</sup>, it was proved that the witnesses had been dealt with; upon which it was urged by the counsel, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute; to which Chief Justice Pemberton answered, that if there were three witnesses to a will, whereof one was a thief, or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct the jury to find it a good will. By which it should seem, we ought to understand his Lordship to mean, that if there was nothing at the time of the attestation to impeach the competency of the witnesses, they must be regarded as credible witnesses at that time, within the proper interpretation of the word *credible*, as used by the statute. But if a witness be *convicted* of felony, and so rendered infamous, at the time of his subscribing the will, it seems not to have been doubted, but that the will was invalid, for defect of a sufficient attestation.

What offences disqualify.

Crimes which stigmatize a man with infamy, when convicted thereof, such as treason, felony, conspiracy at the suit of the crown, perjury, forgery, bartray, attain of false verdict, and which disqualify him for giving evidence upon a trial in a court of justice, disqualify him also for becoming a subscrib-

ing witness to a will<sup>b</sup>. It seems, indeed, to have been formerly a notion, that every offence for which a man had been caused or even sentenced to be set in the pillory, on account of the infamy of the punishment, rendered him incapable of giving testimony<sup>c</sup>; but more modern cases have established, that the infamy of the *crime* only, and not the infamy of the *punishment*, is the ground of disqualification; and according to the present doctrine, persons who have suffered an infamous punishment, unless the offence for which it was inflicted on them, was of the species of *crimen falsi*, or other crime of an infamous nature, are not disabled from giving their testimony in a court of justice, however much their credit with the jury may be affected by such a fact. Before the statute of the thirty-first of this King<sup>d</sup>, persons convicted of petit larceny were judged not to be credible witnesses to attest a will under the statute of frauds. And in the case wherein this was held, the rule was also laid down in strong and clear terms, that it is the crime and not the punishment which makes a man infamous, and vitiates his testimony<sup>e</sup>.

It is the infamy of the offence, and not of the punishment, which disqualifies.

If a man be sentenced to the pillory for a treasonable libel, or slanderous words on government, he is not rendered incapable of becoming a witness in court, and is therefore a credible witness to a will; but if he be convicted of barratry<sup>f</sup>, which is an *infamous*

<sup>b</sup> Com. Dig. tit. Temoigne. A. 2.

<sup>c</sup> Co. Litt. 6. b.

<sup>d</sup> By stat. 31 Geo. 3. c. 35, it is enacted; that no person shall be an incompetent witness, by reason of a conviction of petit larceny.

<sup>e</sup> Pendock v. Mackinder, Willems, 665. 2 Wils. 182. And see Rex v. Ford, 2 Salk. 690.

<sup>f</sup> 5 Mod. 15.

<sup>g</sup> The offence of stirring up suits and quarrels among His Majesty's subjects.

offence, though he be sentenced only to be *fin*ed, he is rendered incompetent as a witness in court, and unqualified, it is conceived, as a *credible* witness, to attest under the statute<sup>r</sup>. Idiots and madmen, and children under the age of common knowledge, who are incapable of discerning or estimating truth, are clearly in a state of legal incompetency to prove a fact, and therefore, can never be regarded as capable of attesting a will, so as to answer what the statute intends by such attestation. And generally, I apprehend, it may safely be concluded, that whatever incapacitates a man as a witness at common law, is an objection to the sufficiency of his attestation as a credible witness, within the meaning of the statute ; for

The word 'credible' as it is used by the statute must be understood in the sense of competent.

'credible,' in the place in which it stands in this statute, cannot well be received in any other sense than 'competent ;' the word in its popular sense being incapable of any constant test or standard, according to which a testator could make his choice of witnesses with any confidence in the validity of their attestation.

Upon the same principle, if the competency, after being lost, has been restored before the attestation, the credit required by the statute has also been re-established, and the attestation will be good. Thus the King's pardon, after a conviction of perjury, or other offence at common law, qualifies the party to attest a will, though, as it should seem, it would be otherwise in the case of a conviction of perjury, on the statute of 5 El. c. 9 (1). And such restoration to

<sup>r</sup> Charter v. Hawkins, 3 Lev. 426. Rex v. Ford, 2 Salk. 690.

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(1) If a man be convicted of perjury upon the statute, he cannot be restored to credit by the King's pardon ; for by the statute, it is part of the judgment, that the convict be infamous, and lose

competency would come too late, as I apprehend, between the time of attestation and examination in court (2).

the credit of his testimony; nothing therefore but a reversal of the judgment, or a statute pardon will, in that case, suffice to restore the competency. *Rex v. Crosby*, 2 Salk. 689, and *Rex v. Ford*, *ibid.* 690. 3 Salk. 155.

Of the qualification of the attesting witnesses in the civil law.

(2) By the laws of the empire, those persons only were capable of attesting a will, who were themselves legally capable of making a will. No persons under puberty, or insane, or mute, or deaf, or prodigal interdicted the use of his own property, or such as the law had judged reprobate or infamous, or had rendered intestable, could be admitted as witnesses to a will. I. 2. 10. 6. D. 28. 1. 20. Neither could women be witnesses to regular or perfect wills: the law admitting them in all matters, whether civil or criminal, when the nature of the case was such that other evidence could not be obtained, but not when there was a choice of testimony, as in making wills, and solemnizing other public acts. Their testimony was admitted in proof of a fact, but not to give validity to a solemn instrument. See this particularity of the civil law explained, and the whole of this title of the Institutes '*qui testes esse possunt*' well commented upon by Vinnius, edit. Helm. 297.

The witnesses by the civil law must be credible, and idoneous, at the time of the will's being made, and according to the humanity of that system, as well as of our own, every one was presumed to be fit as a witness, unless the contrary was made to appear. D. 22.

5. 2. It is to be observed too, that *all* the witnesses ought to be fit, or idoneous, for the whole will was rendered null and void by the insufficiency of *any one* of the witnesses. C. 6. 23. 12. unless a codicillary clause were added, that if it were not valid as a will, it should be valid as a codicil.

If a madman attested in a lucid interval, his attestation was good, and so was that of a prodigal, if, before attesting, he had returned *ad bonos mores*. The integrity and freedom of the witnesses was a great point in the imperial law; in so much, that no person could be a witness to a testament, who was under the power of the testator; and though any number of persons might be admitted witnesses out of the same family, to a will in which the family was not interested, yet if a son of a family gave away his military es-

By the law of Rome no *hæres scriptus* or appointed heir could be admitted a witness to the testament by which he was so appointed, nor could the testimony of any one who was in subjection to such heir, or of his father, to whom he himself was in subjection, or of his brothers, if they were under the power of the same father, be admitted; but the testimony of legataries, and of those who were allied to them, or in subjection to them, was admissible<sup>b</sup>; which was a doctrine, not perfectly agreeable to the *general rule* of the civil law, that no one should be permitted to give testimony in his own cause<sup>1</sup>. Nor is the consistency of that rule saved by the reason given for the admission of such testimony, *viz.* that legataries were particular and not universal successors, and that a testament might be valid without them; whereas the appointment of an heir, was of the essence and constitution of a perfect testament (3), and formed the

<sup>b</sup> I. 2. 10. 10. 11.<sup>1</sup> Cqd. 4. 20. 10.

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tate, or *peculium*, after leaving the army, neither the father, nor any one under the power of the father, could be a witness to the testament. In excuse for which rules of exclusion, the extent of the paternal authority among the Romans should be remembered; and, indeed, so adjusted to one another do the several parts of the system of the Roman jurisprudence appear to be, that the student will have considered them with little advantage in a view to the illustration of such of our own laws as have been copied from them, or are in affinity with them, unless he has found time and possessed curiosity to make that great work of human policy a distinct and specific branch of his studies.

(3) The exactest definition of a Roman testament has been thought to be this—the appointment of an executor or testamentary heir, made according to the formalities prescribed by law. Domat. lib. 1. t. 1. sect. 1. and see D. 28. 5. 1.

principal feature of distinction between that and a codicil (4), or a *donatio causa mortis*.

In the spiritual courts of this kingdom, to which the sole cognizance of the validity of wills belongs, where they relate to personal estate, the rule always was, that no legatee could give his testimony in *foro contradictorio*, in support of the validity of the will, till he had released his legacy or received the value thereof, and in case of payment, the executor of the supposed will was called upon to release all title to any future claim upon such legatee, who might otherwise be obliged to refund if the will were set aside: (5) The same rule prevailed in our courts of common law with

Of the rule of the spiritual and common law courts, where the witness was a legatee or devisee.

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(4) There is no difference in our law, as to publication, between codicils and wills; but codicils are said by Justinian, *nullam solemnitatem ordinationis desiderare*: which Viuius comments upon with disapprobation, as not being consonant to the Theodosian code; and complains of the *jejuna quorundam distinctio inter solemnitatem ordinationis et probationis*. Heineccius, however, maintains the distinction thus: *In testamentis condendis testibus opus erat talibus quibuscum olim fuerat testamenti factio in comitiis calatis, quia jure vetustissimo lex erat populi suffragiis perlata, jure novo solemnisi mancipatio hæreditatis. Omniu ergo hic solemnium. At codicillis erant epistolæ. Quis epistolis testes adhibet? quis in iis solemnitatem requirit? valebat hujusmodi epistola, etiam non obsignata, dum de ejus fide constaret: quia enixæ voluntatis preces ad omnem successionis speciem porrectæ videbantur. Testes ergo adhibebantur ab iis, qui nuncupative fidei committebant. Postea autem in scriptis codicillis intestatorum testium opus erat præsentia per L. 1. C. Theod. de test. et codicill. non solemnitatis causa, sed ut testantium successiones sine aliqua captionem seruentur. Ergo non solemnitatis causa adhibendi, sed probationis causa. Nec aliud voluit Theodosius dum in omnibus codicillis testes requisivit. Vin. Com. lib. 2. tit. 25.*

(5) In the late case of *Lees v. Summersgill*, 17 Vez. jun. 508. the statute 25 G. 2. c. 6. which has made such release unnecessary, by making void the legacy given to the subscribing witness, was held to extend to wills of personal estate.



respect to the inadmissibility of the testimony of a devisee or person benefited under a will of real estate, to establish its validity ; and it appears from the case of *Anstey v. Dowsing*<sup>k</sup>, that, if a legatee, who was a witness to a will, refused either to renounce or to receive a sum of money in lieu of his legacy, he could not be compelled by law to divest himself of his interest, and while his interest continued, his testimony was useless.

J. T. made his will, by which he disposed of his real estate, and gave to one J. H. and his wife, 10*l.* each for mourning, with an annuity of 20*l.* to E. H. the wife of J. H. The will was attested as the statute directs, by three witnesses, whereof J. H. was one. The legacies, and satisfaction for the annuity were tendered and refused. And the question upon the special verdict was, whether, or not, the will was well attested according to the statute of frauds. The judges of the King's Bench were unanimously of opinion, that a right to devise lands depended upon the powers given by the statutes, the particulars of which were, that a will of lands should be in writing, signed and attested by three *credible* witnesses in the presence of the devisor : that these were checks to prevent men from being imposed upon : and certainly meant that the witnesses to a will, (who are required to be *credible*) should not be persons entitled to any benefit under that will. And that, therefore, J. H. was not a good witness<sup>l</sup>.

It seems also, that the question was started in this case, whether a benefit to a witness at the time of his

<sup>k</sup> Vid. Harris, Inst. Just. lib. <sup>l</sup> Strange 1254.

2. tit. 10. s. 11.

attestation, should annul his testimony, though, at, or after the testator's death, he should become disinterested by a release of his legacy, or the receipt of the value thereof, and that it was held, that the condition of the witness, *at the time of his attestation*, must be regarded; and that if interested *then*, he could not be a good witness. The doubts and objections agitated in this and in other cases<sup>m</sup>, occasioned the statute 25 G. 2. c. 16<sup>n</sup>. to be passed, whereby the contests concerning the force and obligation of the word '*credible*' in respect to the attestation of persons benefited under the will, were finally composed.

The inquisitive student, however, will still recur to the perusal of Lord Mansfield's<sup>o</sup> and Lord Camden's arguments<sup>p</sup> on the opposite sides of the question, concerning the import and exigency of the words '*credible witnesses*,' used by the statute. He will find Lord Mansfield strenuously of opinion, that though a witness might be entitled to a benefit under a will at the time of the attestation, yet if he became disinterested *before his examination*, his testimony was restored, and the will was supported by his attestation. In his Lordship's judgment, the word '*credible*' could have no meaning beyond '*competent*,' without leading to great absurdities; and in this *general* exposition of the word, Lord Camden coincided, but their difference was this: Lord Mansfield would understand '*competency*' to imply nothing more than what was *tacitly*

Of the opposition in sentiment between Lords Mansfield and Camden, on the import and exigency of the word '*credible*' in the statute.

<sup>m</sup> Hilliard v. Jennings, Com. Rep. 91. and 7 Bac. Abr. edit. Gwyllim, 329. Price v. Lloyd, 1 Vez. 503. 2 Vez. 374.

<sup>o</sup> Wyndham v. Chetwynd, 1 Burr. 414.

<sup>p</sup> Hindon v. Kersey, 4 Burn. Eccl. L. 97.

<sup>n</sup> See this stat. in the Appendix.

*contained in the word witness by itself*, (no man being a witness unless he is competent to give his testimony); so that it appeared to his Lordship that the competency was to be seen and adjudged of *at the time, and with reference to the time of examination in court*. Whereas according to Lord Camden the *credibility*, i. e. *competency*, must be regarded as it stood at the time of the attestation. By Lord Mansfield's explanation of the force of the word *credible*, it became a dead letter, and, therefore, his Lordship reduced himself to the necessity of supporting his argument, by supposing the word '*credible*,' to have slipped in through the inadvertency of the framers of the statute, which he denied to be the production of Lord Hale, any further than, perhaps, as being compiled from some of his loose notes unskillfully digested.

His Lordship adverted to the rule of testimony in the Ecclesiastical Courts, and at the common law, where a release payment or tender made the testimony of the witness good. Nice objections of a remote interest, which could not be paid or released, though they hold in other cases, were not enough to disqualify a witness in the case of a will. Thus, parishioners, he said, might prove a devise to the poor of the parish for ever. Interest was no positive disability; it only afforded a *presumption of bias*, and on that ground rendered a witness incompetent; but still, it was *only presumption*, and presumptions only stood till the contrary was made apparent; if the bias were removed, the presumption ceased. That nothing could be more reasonable than to allow this objection of interest to be purged *by matter*

*subsequent to the attestation*, and previous to the trial.

Lord Camden, on the other hand, in the case of *Hindon v. Kersey*, argued, that the word ‘*credible*’ imported a *necessary* and *substantial* qualification of a witness *at the time of his attestation*. And that if the witness was incompetent *at that time*, nothing *ex post facto* could restore the validity of his attestation; neither could such devisee, or person taking a benefit under the will, be received as a witness for other devisees under the same will: the objection was irremovable, and the *whole* instrument, as far as it concerned real property, was void.

He was of opinion, that the novelty introduced by the statute was the *attestation*, the method of *proving* which was left standing upon the old common law principles; as that one witness might prove what all the three had attested; and, though that witness must be a subscriber, yet that was owing to the general common law rule, that the best evidence must be produced. He considered, therefore, that the statute had principally in view the *quality* of the witnesses *at the time of the attestation* (6). That a will was

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(6) In *Brograve v. Winder*, 2 Vez. jun. 636, an objection was taken to the competence of one of the witnesses to the will, as being interested *at the time of his examination*; but as he had no interest *at the time of the execution of the will and death of the testator*, the Lord Chancellor, without argument, held him to be a good witness.

It may be as well to observe here, that a legatee may be a witness to impeach a will, as in such a case he swears against his own interest. Salk. 691. And before the statute 25 G. 2. c. 6. he was

the only instrument which required to be attested by subscribing witnesses at the time of execution ; while leases, marriage agreements, declarations, and assignments of trusts, were only required to be in writing and signed. Those were all *transactions of health*, and protected by valuable considerations, and antecedent treaties. The power of a court of equity was thought sufficient to meet every fraud that could be practised in those cases ; but a will was often executed suddenly in a last sickness, and sometimes in the article of death ; and the great question to be asked in such case was this,—was the testator in his senses when he made the will<sup>a</sup> ? and consequently the time of the execution was the critical minute which required guard and protection. An act so solemn, and often calling for a laborious recollection and investigation, executed at such a time, was pregnant with suspicion. What then, his Lordship said, was the employment of the witnesses ? It was to inspect and judge of the testator's sanity before they attested, and if he was not capable they ought to refuse to attest. In other cases, the witnesses were *passive* ; here they were *active*, and in truth the principal parties to the transaction. **THE TESTATOR WAS INTRUSTED TO THEIR CARE.**

The design of the statute was to prevent wills from being made, which ought not to have

<sup>a</sup> Vid. Doe. on dem. *Walker v. Stephenson*, 3 Esp. Ni. P. Ca. 284.

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a good subscribing witness where he took the same legacy by a former will, for then it was indifferent to him which will prevailed, 1 Burr. 427. Lord Ailesbury's case.

been made, and *always operates silently by intestacy*. It is true, continued the Chief Justice, the design of the statute was to prevent fraud; and though no suspicion of fraud appeared in the case before him, *yet the statute had prescribed a certain method*, which every one ought to pursue to prevent fraud<sup>r</sup>. As to the minuteness of the interest, as there was no positive law which was able to define the quantity of interest which should have no influence upon men's minds, it was better to leave the rule inflexible than to permit it to be bent by the discretion of the judge.

Both these cases came before the respective judges, after the statute 25 G. 2. c. 6. had passed; and that of Wyndham *v.* Chetwynd appears to have fallen precisely within the second clause of that statute, the subscribing witness being a creditor, and the will having charged the debts upon the land; probably, however, the suit had commenced in Chancery before the 6th of May, 1751, and so came within the 8th section of the same statute, which left the cases, which were in litigation before that time, to be adjudged and determined as if that statute had never been made.

The case of Doe dem. Hindon *v.* Kersey, in which, the devise being to trustees to dispose of the rents to the poor of a township, the subscribing witnesses were interested as possessing property rated to the poor in that township, was clearly not within the statute 25 G. 2. c. 6.

<sup>r</sup> Vid. in *Lea v. Libb*, Carth. 37. the words of the court.

It will occur to the attentive reader, however, that, although Lord Mansfield was supported by all his brothers, and Lord Camden was over-ruled by those who sat with him, the legislature shewed their sense of the subject to agree with the policy and principles of Lord Camden's reasoning, by extinguishing the interest of the subscribing witness, where he took an interest as devisee or legatee, *at the moment of the attestation*. By this provision of the legislature by their second act, they seem to have declared their intention by the first; and still, in their alteration of the law, regarding the time of the attestation as the particular juncture to which the qualification related, they have made the interest of the individual a sacrifice to the will.

## SECTION XV.

*Time and Manner of making the Attestation.*

UPON a feigned issue, tried in the Court of Common Pleas, the question was, whether the will was made according to the statute of frauds? for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. The Court said, the statute required attesting in his presence, to prevent obtruding another will in the place of the true one. It is enough if the testator *might* see, it is not necessary that he *should actually see them* signing; for, at that rate, if a man should turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he *might* have seen it, and that is enough. And they compared it to the case, where the testator lay sick in bed, with the curtain drawn\*, while the witnesses subscribed.

That it is enough if the testator might see the witnesses whether he *did* actually see them or not.

On a trial at bar, where the question was, whether the witnesses to a will had pursued the directions of the statute of frauds, in the manner of subscribing their names, it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so

\* Shires v. Glascock, 2 Salk. 688.



that he *might* see them subscribe their names if he would, though there was no positive proof that he *did* see them subscribe their names, there was a sufficient subscribing within the meaning of the statute ; because, *it was possible* that the testator *might* see them subscribe ; and the court held, that if the witnesses subscribed their names in the same room where the testator lay, though the curtains of the bed were drawn close, it was a good subscribing within this statute <sup>b</sup> (1).

A similar doctrine was maintained by Lord Thurlow in the court of Chancery, in a case circumstanced as follows<sup>c</sup> : Honora Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the

<sup>b</sup> Davy and Nicholas v. Smith, 3 Salk. 395.

<sup>c</sup> Casson v. Dade, 1 Bro. C. C. 99.

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(1) The notion of the civil lawyers was more rigid and cautious in this respect. The attestation ought to be in *conspectu testatoris* ; and further, *non est satis, ut quidam tradiderunt, testes oculatos esse, si testatorem ipsi non videant, forte velo, aut cortina interjecta conspectum alimente, licet vocem ejus audiant : sed necesse est ut faciem ejus videant, ne qua fraus fiat, alio forte subornato, qui vocem testatoris imitando simulet.* Vinn. Com. 1. lib. 2. tit. 10. And Vinnius was of opinion, that a *blind man* (de quo nihil traditum est) could not be a witness because he could not satisfy the law, which required that the testator should be seen by the witnesses, and that they should be able to recognize the testator's signature. The English law, however, is clearly otherwise in this respect, as an acknowledgment of the signing has been held sufficient, as appears above ; and it has been adjudged, that it is not necessary to the execution by a blind man that the will should be read over to him in the presence of the subscribing witnesses. Longchamp v. Fish, 2 N. R. 415.

office very hot, she retired to her carriage to execute the will, the witnesses attending her ; after having seen the execution they returned into the office to attest it ; and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, that the testatrix might see what passed. Immediately after the attestation, the witness took the will to her, which she folded up and put into her pocket. The Lord Chancellor inclined very strongly to think the will well executed, and the above-mentioned case of Shires and Glascok, was relied upon as an authority. Mr. Arden pressed for an issue, but finding the Lord Chancellor's opinion very decidedly against him, he declined it.

In *Broderick v. Broderick* <sup>4</sup>, where the testator devised lands to J. S. and his heirs, and duly subscribed his will in the presence of three witnesses, who went down stairs into another room, and attested the will there, which was *out of the presence of the testator*, the relief afforded to the heir against a release obtained from him by the devisee, under a false assurance that the will was sufficiently executed, was a necessary consequence of the opinion of the Chancellor<sup>5</sup>, that the devise was void for want of an execution conformable to the statute. And it was in vain contended for the devisee, that the will, as to the devisor, was *executed*, and that the form of subscribing in the presence of the testator, was only directed by the statute of frauds, to prevent a rash disinherison of the heir ; but that since the execution of the will was fully proved, though the circumstan-

<sup>4</sup> 1 P. Wms. 239.

<sup>5</sup> Lord Hartcourt.

ces required by the statute had not been observed, yet it was the plain intention of the testator, that the devisee should have the estate ; and that the devisee having the legal estate, it would be hard to take it from him in equity, and by those means to dispose of the estate *against the intent of the testator from the devisee, for want of a ceremony*, when the *end* of that ceremony was answered, by its being made to appear, undoubtedly, that the testator did sign and seal this will.

Nor will the subscription of the witnesses in the *same room* always satisfy the statute, or necessarily imply it to be in the testator's presence ; for, as was observed by Lord Chancellor Macclesfield, in *Longford v. Eyre*<sup>f</sup>, it might be done in a corner of the room in a clandestine and fraudulent way, and then it would not be a subscribing in the testator's presence. But his Lordship further said, that as it was sworn by the witness, that he subscribed the will at the testator's request, and in the same room, that could not be fraudulent, and was well enough.

In a late case, in the King's Bench, it was laid down by the Chief Justice, that it was not necessary that the devisor should actually see the witnesses subscribe : as, in favour of attestation it was to be presumed, that if the testator might see he did see. But his Lordship added, that if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's pre-

<sup>f</sup> 1 P. Wms. 740.

<sup>g</sup> Doe lessee of Wright v. Manifold, 1 Maule and Selwyn, 294.

sence, as to which the rule is, that when the devisor cannot, by possibility, see the act doing, it is done out of his presence.

Thus, therefore, the law upon this subject seems sufficiently settled upon this distinction, that if the attesting witnesses subscribe the will in such a situation with respect to the testator, as that it was not possible for him to have seen the act done by them, such will is void as to real estate for the defect of solemnity in its execution ; but if their situation was such as to afford the testator the opportunity of seeing them subscribe, if he chose, their attestation under such circumstances will be good and valid, although in point of fact they may not have been seen by the testator in the very act of subscribing their names.

The mere corporal presence, however, of the testator, unless his mind and faculties also are present, will not satisfy the statute on this point; for there must be a mental knowledge of the fact, so that, as a subscription clandestinely made in a corner of the same room with the testator was not, on this account, a sufficient attestation, so neither would such subscription in the same room suffice, if the percipience and intelligence of the testator were gone so as to constitute it an act done without his knowledge. On this principle was founded the decision of *Right v. Price*<sup>a</sup>, in which case, the form of an attestation was written on the second sheet, and the witnesses put their names to it in the room where the testator lay ; but he was in a state of insensibility : and the question was, whether this will was duly executed for passing lands according to the statute of frauds ?

It is not enough that the testator is corporally present, he must possess his faculties so as to have a mental knowledge of the fact.

<sup>a</sup> Doug. 241.

In support of the will it was argued, that insensibility was something short of death, and if the testator was alive, it could not be said that the will was not attested in his presence. That the question was, whether the testator, having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be set aside, because a formality required, according to an implied intention of the legislature, has not been complied with ; that it did not appear but that the testator might, by possibility, have opened his eyes, while the witnesses were subscribing their names ; which, according to the law as laid down in *Shires and Glascock*, would have been sufficient.

But the court said, that they would lean in support of a fair will, and not defeat it for a slip in form, where the *meaning* of the statute had been complied with ; this was the principle of *Shires and Glascock's* case, and other cases of that sort. But the case then before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent as to all mental qualities. That it was usual, in precedents of wills, to say, that the witnesses subscribed at the request of the testator ; that indeed was not expressly required by the statute, but the practice shewed the general understanding, and that the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case, the testator could not know whether the will that he

had begun to sign was that which the witnesses attested; he was dead to all purposes or power of conveying his property.

It seems not to have been judicially decided, whether an acknowledgment by a subscribing witness to the testator of his hand-writing to the attestation, would be sufficient. In the case of *Risley v. Temple*<sup>1</sup>, the facts were, that the testator lying sick in bed, made his will, and signed, scaled, and published it, in the presence of three witnesses, but, being tired, ordered them to go and subscribe it in another room. They went into another room, out of the presence and sight of the testator, and subscribed their names, and then returned and owned their names to the testator, who looked upon the will, and said, ‘*they have done well.*’ But this point was not spoken to in the case according to the report.

Whether an acknowledgment by the subscribing witness to the testator would be sufficient.

It is very plain, however, that to hold such an acknowledgment sufficient, would be in direct opposition to the words of the statute, which, though it does not by the 5th section require the *signature of the testator himself* to be in the presence of the witnesses, does yet expressly direct the *subscription of the witnesses* to be in the testator’s presence. And it seems little to be doubted, but that, agreeably to the greater regard for the words of the statute, which now seems to prevail in our courts of justice, such an acknowledgment by a subscribing witness, of his hand-writing to the attestation, made to the testator, after making the subscription out of his sight and presence,

<sup>1</sup> Skin. 107.

would be deemed an insufficient compliance with the statute.

That the witnesses may subscribe at different times.

It has been shewn, that a testator may *write*, and we shall now make it appear from the authorities, that he may *publish* his will at different times, or, in other words, that an attestation made by the witnesses respectively at three different times, if in the presence of the testator, satisfies the law (2). The

(2) It may be interesting to compare our own with the civil law upon this article. In an early period of the Roman jurisprudence, it was held, that a testament ought to be made *uno contextu*, without any foreign act intervening, and the witnesses were likewise required to attest, without separating, or even discontinuing the act of subscribing, till all was complete. And, indeed, it does not seem—that the witnesses were ever released from the necessity of subscribing at one time and in each other's presence. In favour, however, of certain unavoidable interruptions, the Emperor Justinian limited and explained the generality with which the rule had been expressed. In the Sixth Book of the code, tit. 23. 28. the qualification of the doctrine is thus propounded: *cum antiquitas testamenta fieri voluerit nullo actu interveniente, et hujusmodi verborum compositio non rite interpretata pene in perniciem, et testamentum et testamentorum processerit: sancimus in tempore quo testamentum conditur, vel codicillus nascitur, vel ultima quædam dispositio secundum pristinam observationem celebratur (nihil enim ex ea penitus immutandum esse censemus), ea quidem quæ minime necessariæ sunt, nullo procedere modo, quippe causa subtilissima proposita, ea quæ superflua sunt minime debent intercedere. Si quid autem necessarium evenerit; et ipsum corpus laborantis respiciens contigerit, id est, vel victus necessarii, vel potionis oblatio, vel medicaminis datio, vel impositio, quibus relictis ipsa sanitas testatoris periclitatur, vel si quis necessarius naturæ usus ad depositionem superflui ponderis immineat, vel testatori vel testibus, non esse ex hac causa testamentum subvertendum, licet morbus comitialis, (quod et*

two leading cases to establish this point are, *Cook v. Parsons*<sup>k</sup>, and *Jones v. Lake*<sup>l</sup>. The first of which cases was decided upon a bill of review to reverse a decree of Lord Nottingham in 1682, for a sale of lands subjected by the will to the payment of debts. The lands were devised by the testator to trustees, and their heirs, to set and to farm let, and out of the rents (without saying profits) to pay his debts; and all his debts and legacies being first paid, he gave the surplus to F. S.

<sup>k</sup> Prec. Ch. 185.<sup>l</sup> 2 Atk. 176.

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*factum esse comperimus) uni ex testibus contigerit: sed eo, quod urget et imminet, repleto, vel deposito, iterum solita per testamenti factionem adimpleri. Et si quidem a testatore aliquid fiat testibus paulisper separatis, cum coram his facere aliquid naturale testator erubescat, illorum introductis consequentia factionis testamenti procedere.*

The phrase '*uno contextu*' is not to be understood as relating to the composition of the will, (which it seems might be taken up and prosecuted at intervals, according to the necessary interruptions of business, and as the leisure of the party allowed; as was said to be the law with us, in *Carleton v. Griffin*, above cited) but to the mode of publishing and solemnizing the will, by the formal *nuncupatio testamenti*, or *declaratio voluntatis* to the witness, with the ceremonies of subscribing and sealing by them, and the signing by the testator, which ought all to be done at one time, that is to say, *uno actus contextu*, without the intervention of any act or business foreign to the purpose which the parties were met together upon, which, unless it happened on the natural and necessary occasions alluded to in the passage from the code above extracted, would vitiate the testament, as being inconsistent with the solemnity of its celebration. Thus Vinuius translates '*uno contextu*' into the Greek by *μια ὕφη*, and *ἀδιαλείπτως*, as being applicable not to the composition of the will, but to the publication of it; which is plainly the sense of it, as it stands accompanied in the text of the institutes, "*et testes quidem eorumque præsentia, uno contextu, testamenti celebrandi gratia, &c.*"



This will was written with the testator's own hand, as was proved ; and was published in the presence of three witnesses, at three several times, and they all attested it in his presence, but he did not sign it in the presence of the second witness, but only owned the signing to be his hand, and desired him to attest the will, as was proved by that witness. The testator died, leaving an infant heir, and the land was decreed to be sold, and no day given the infant to shew cause against it. One of the objections to the decree was—that this was no good will within the statute of frauds and perjuries, because not attested by all the witnesses at *one* time, and that one of them did not see the testator sign, but only hear him own that it was his hand.

But the Lord Keeper held a publication of a will before three witnesses, *though at several times*, to be sufficient, and thought the writing of the will with the testator's own hand (3), a sufficient signing within the statute, though not subscribed nor sealed by him, but doubted whether acknowledging the subscription to be his own would suffice (4).

In *Jones v. Lake*, the case upon the special verdict was thus ; the testator signed and executed his will in December, 1735, in the presence of *two witnesses*, who attested the same in his presence ; afterwards, in

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(3) According to the Code 6. 23. 28. the writing of the will with the testator's own hand, dispensed with his signing ; but it was added as a condition, *et hoc specialiter in scriptura reposuerit, quod hoc sua manu confecit* ; and it dispensed with no other solemnity.

(4) This question has been already discussed, and shewn to have been otherwise determined.

the year 1739, he with his pen went over his name, in the presence of a *third witness*, who subscribed his name *in the testator's presence*, and at his request: and the question was, whether this was a due execution within the statute. For the heir at law it was argued, that the statute requiring three witnesses to subscribe in the testator's presence, must intend *they should be all present together*; otherwise, there was not that degree of evidence which the statute requires; for an attestation of three witnesses, at different times, *has only the weight of one witness*. Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution. A man may be sane at the time *two* witnesses attest, and insane when the *third* attests. It cannot be considered as a will, till the third witness has signed, for that completes the act. The will was dated in 1735; suppose lands to be purchased after the date, and before the attestation by the third witness, would the lands pass? "certainly not."

On the other hand, it was argued for the devisee, that a will executed before three witnesses, *though at three different times*, was good; the statute not requiring they should *all* be present at the *same* time. That the requisites under the statute were, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites which the act did not mention, and in effect be making a new law.

The Lord Chief Justice Lee said, the case depended upon the words of the statute. The requisites in the

statute, were, that *three witnesses should attest his signing*, but it did not direct that three witnesses should be *all present at the same time*. Here, said the Chief Justice, you have the oath of three attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to three persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular. It would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. Judgment was accordingly given against the heir at law.

The judges, in the case of *Ellis v. Smith*,<sup>m</sup> admitted the authority of these cases, and drew from them an inference in favour of the validity of the testator's acknowledgment to the witnesses of his hand-writing to the signature of the will. "To strengthen the authorities I have already mentioned, said the Lord Chief Baron Parker, I shall take notice of the cases which allow the witnesses to subscribe at different times; and I think they support the admission of the declaration in question; since the testator is not supposed to run over his name before every witness, but having signed before one to *acknowledge* it only before the rest (5). The same conclusion was drawn by Lord Chancellor Hardwicke, Sir John Strange, Master of the Rolls,

<sup>m</sup> 1 Vez. jun. 11.

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(5) In *Jones v. Lake*, (the last case produced,) the testator did run over his name again; but the principle of the decision implied the sufficiency of an attestation, made at three distinct times.

and Lord Chief Justice Willes. The last of whom observed, that the authorities not in point supported the decree more strongly than those in point, for they allowed the attestation and subscription of the witnesses at different times to be good; and the testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two. And in the opinion of the Master of the Rolls, to permit the witnesses to attest at several times, was to admit the asseveration of the testator that it was his will, to be equivalent to signing it before the witnesses; to which Lord Hardwicke added, that he differed from those who thought that the cases which had been mentioned, only supported the case before the court, by consequential reasoning; he thought them directly in point.

It is to be observed, however, that these decisions, in the opinion of the whole court, went too far, and opened the way to frauds, and particularly the Chief Justice observed with great force, that “he had known one man swear, that he did not see the testator sign, and the other two swear that he signed it before the three; so might one man swear, that when he attested the will, the testator was insane; another, that he was sane; and thus an inlet was given to great frauds and impositions. But when they attested it *simul et semel*, they were a check upon each other, and such frauds were prevented (6); nay, said his Lordship, I think

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(6) This was certainly the doctrine of the civil law, from which the framers of the statute in question borrowed, in making this provision for preventing the forgery of wills. We have shewn that the words ‘*uno contextu*’ related to the complex ceremony of publication, which was necessary to be done by a *continued* act. The

a *parol* disposition before three, full as solemn an act as a will in writing, attested by three *separatim*." He admitted, however, that the decisions were the other way, and that the point was established.

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attestation, therefore, which was an essential part of the publication, was necessary to be done by the witnesses, *simul et semel*, at the same time, at the same place, and in sight of each other; not meaning, of course, by the *same* time, *eodem instanti*, but *uno actus contextu*, at one juncture, without break or interruption\*, as the text of the Code (6. 23. 21.) well explains it, distinguishing at the same time between the act of making and that of celebrating and publishing the will, to which last-mentioned act the words '*uno contextu*' are shewn to be alone applicable. *In omnibus autem testamentis quæ presentibus vel absentibus testibus dictantur, superfluum est uno, eodemque tempore exigere testatorem, et testes adhibere, et dictare suum arbitrium, et finire testamentum; sed licet alio tempore dictatum, scriptumve proferatur testamentum, sufficiet uno [tempore] eodemque die, nullo actu [extraneo] interveniente, testes omnes, videlicet simul, nec diversis [temporibus] scribere, signareque testamentum. Finem autem testamenti subscriptiones, et signacula testium esse decernimus.* This exactness with respect to the simultaneous performance of the act of publication was retained out of the civil law, or *jus civilis*, when the civil and prætorian law were reduced into agreement, as I have before shewn: for the efficacious form of a will, as ultimately established, was a tripartite constitution. The necessity of witnesses, and their presence at one and the same time, was founded on the *jus civilis*—the subscriptions by the testator and the witnesses were enjoined by the imperial constitutions—the sealing and the number of the witnesses, were settled by the edict of the Prætor.

\* All solemn legal acts and ceremonies were necessary, by the civil law, to be executed without interruption, the common phrase to express which was, '*uno contextu absolvi*.'

## SECTION XVI.

*Evidence of the Attestation.*

IT has been already made to appear, that a will of lands may be sufficiently established in a court of justice, as to the testator's signature, by proof of his acknowledgment thereof. It will be proper now to consider, what is sufficient *proof* of the due *attestation* of such a will, according to the directions of the statute. We have seen that upon a question before the court, whether or not it should be left to a jury, to determine as to the fact of a due attestation in the presence of the testator, where all the witnesses were dead, it was clearly held, that such question was proper for the decision of a jury, who might found their verdict upon mere circumstances and probabilities<sup>a</sup>.

In the courts of common law, where a will of lands is produced, it is usual to call but one witness to prove it; but that is said only to be the case where no objection is made on the part of the heir, who is entitled to have all the witnesses examined, yet in such case the heir himself must produce the other witnesses, for the devisee need produce only one, if that one can prove all that is requisite to establish the validity of the will<sup>b</sup>. He must prove that the testator signed, in the presence of himself and the other witnesses, or that he acknowledged his signature to each of them, and that each of the witnesses subscribed in his pre-

In the courts of common law, one of the subscribing witnesses may prove the attestation by the others.

And if all the witnesses deny their signatures, still the devisee may go in-

<sup>a</sup> Hands v. James, 2 Com. Rep. 530. Croft v. Pawlet, 2 Str. 1109. Bruce v. Smith, Willes 1.

<sup>b</sup> Gilb. Eject. Sect. 8. Holt Rep. 742. Dayrell v. Glascock. Bull, N.P. 264. 1 Esp. N.P. Rep. 391.

to circumstances to prove the due execution of the will.

sence. Where the witnesses have signed separately, as one can only prove his own act, they ought all to be called. If the two other witnesses be called by the heir, and refuse to verify their attestation, still the proof of their hand-writing will be enough, if one of the three can prove the other circumstances of the execution. Indeed, it has been held, that if they *all* swear that the will was *not* duly executed, the devisee may yet go into circumstances to prove the due execution<sup>c</sup>. And if an attesting witness to a will impeach its validity on the ground of fraud, and accuse other subscribing witnesses who are dead, of being accomplices in the fraud, it is competent to the person claiming under the will, to give evidence of their general good character<sup>d</sup>.

Whether the evidence of the subscribing witnesses can be received against their own attestation.

It appears, and with the greatest reason, that the evidence of subscribing witnesses against their own attestation has always been received, if received, with the utmost reluctance; and the courts have, on the other hand, been very ready to admit counter-testimony to establish the will against such suspicious and discordant depositions. In *Lowe v. Jolliffe*<sup>e</sup>, which was tried at bar, upon an issue of *devisavit vel non* out of Chancery, the three subscribing witnesses to the testator's will, and the two surviving witnesses to the codicil, and a dozen servants of the testator, all swore him to be utterly incapable of making a will, or of transacting any other business, at the time of making his supposed will and codicil, or at any intermediate time. But this evidence was opposed by the depositions of several of the nobility and principal gentry of the county where the testator resided, who

<sup>c</sup> Pike v. Badmering. Strange 1096.

<sup>d</sup> 1 Blackst. 365, 416. <sup>e</sup> 3 Burr. 1244, and see 6 East, 195.

had frequently and familiarly conversed with him, during the whole period, and some on the very day on which the will was made ; and also of two eminent physicians who attended him, and who all swore to his entire sanity and more than ordinary intellectual vigour (1).

The counsel for the plaintiff also examined to the like purpose the attorney, a person of unblemished reputation, who drew the will ; and read the deposition of the attorney, by whom the codicil was drawn and witnessed, (he being dead, and his testimony perpetuated in chancery), who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct in dictating the contents of his codicil. Upon the whole, it appeared to be a very black conspiracy, to set aside the will, without any foundation whatsoever ; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. Lord Mansfield then declared himself fully persuaded, that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured ; and called for the subscribing witnesses, in order to commit them in court, but they had withdrawn themselves. A prosecution of some of them for perjury was strongly recommended by the court ; and the three testamentary witnesses were afterwards convicted, and sentenced, each of them, to be imprisoned for six months, to

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(1) See some observations of Sir William Grant, the present Master of the Rolls, in *Burrows v. Locke*. 10 Vez. Junr. 474.



stand twice in the pillory, with a paper on their heads, denoting their crime, once at Westminster Hall Gate, and once at Charing Cross, and to be transported for seven years.

It is observable that, although the testimony of these subscribing witnesses against their own attestation was *ultimately discredited*, no doubt was entertained of their competency ; as was remarked by the late Lord Chief Justice Kenyon, in commenting upon this case, in *Bent v. Baker* (2) who entirely approved of Mr. Justice Buller's distinction in this respect between *negotiable* and *other* instruments. So that the observation of Mr. Justice Yates, in the case of *Alexander v. Clayton*<sup>d</sup>, viz. that " the witnesses ought not to have been admitted to give evidence against their own attestation," seems to have been too strong for the present doctrine, or perhaps incorrectly stated by the reporter.

It is one thing to offer testimony to destroy the validity of an instrument attested by one's own signature and subscription, and another to deny the *fact* of one's own attestation. *Lowe v. Jolliffe*, as above cited, is an example of the admissibility of the former species of testimony as well as of its liability to be impugned. It is plain, upon principles, that a man ought to be admitted to deny what appears to be his own attestation ; for to exclude him on a ground of inconsistency and contradiction, is to take for granted against him what is itself a primary object of

<sup>d</sup> 4 Burr. 2224.

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(2) 3 T. R. 34. and see the reasons for this distinction in Mr. J. Buller's opinion, pronounced by him in the same case.

proof. But it is equally clear, that his denial may be discredited and overthrown by the counter-testimony of the other witnesses, and that the will may be established against such a denial. Thus in the case of *Alexander v. Clayton*, mentioned above, Mr. Justice Yates observed, that there were many cases where one of the witnesses had supported a will, by swearing that the other two had attested, though they both denied it. And upon the same occasion it was said by Lord Mansfield, “that he had known several cases, both upon bonds and wills, where the attestation of witnesses had been supported by the evidence of the other witness, against that of the attesting witnesses who had denied their own attestation. It would be, added his Lordship, of terrible consequence, if witnesses to wills were to be tampered with to deny their own attestation.”

Thus, therefore, the law appears to be well settled and discriminated upon these important points of evidence; and it is to be observed, that the present consideration is confined to the case of subscribing witnesses; and that therefore there is nothing in what has been stated, or produced, which contradicts the maxim of law, as it was recognised, or decided upon in *Walton and others v. Shelley*\*, that *no man shall be suffered to give evidence to invalidate his own instrument*; nor does it seem that Lord Mansfield, in pronouncing his judgment in that case, laid down the rule with greater latitude than accords with the settled distinction, *as to the testimony of subscribing witnesses*, above adverted to. “What strikes me,” said his Lordship, “is the rule of law, founded upon

Of the doctrine laid down generally by Lord Mansfield, in *Walton v. Shelley*.

\* 1 T. R. 290.

public policy, which I take to be this—that no PARTY who has signed a *paper* or *deed*, shall ever be permitted to give testimony to invalidate that instrument which he has signed.” Now it is plain, that a subscribing witness to a deed or will, is in neither case, by force of such subscription, a PARTY to the instrument.

A distinction between the attestation of wills and deeds, in respect to the point under consideration.

It is true, indeed, that the admission of a subscribing witness to a will to invalidate *that* instrument, forms a stronger case than where such witness comes to destroy the validity of a *deed* which he has attested; since, in the latter instance, he attested only the execution, and not the intrinsic or general validity of the instrument; but in the former, the testamentary capacity of the testator, as well as his formal execution, is verified by the subscription of the witness; not to mention also that such subscription is essential to the constitution and perfection of the instrument itself, so that in giving testimony against the validity of the will which he has attested, he comes to overthrow that which he himself was *actively* and *instrumentally* concerned in establishing.

And between negotiable instruments and other instruments.

It seems probable, therefore, that the consideration of these peculiarities, belonging to the attestation of wills, suggested to Lord Kenyon a foundation for the resemblance, which, in the case of *Adams v. Lingard*<sup>1</sup>, his Lordship appeared to think there existed between the case of an indorser of a bill and a subscribing witness to a will, as to the admissibility of their evidence to overthrow the instrument to which they had given credit by their signature. In

Adams *v.* Lingard, which was the case, of an indorser of a bill, the late Chief Justice said, that he wished the point to be settled in the House of Lords, being then of opinion, that the indorser was a witness proper to be heard, and other judges being of a contrary opinion. He then mentioned a case which was before Sir Joseph Jekyll, many years before, and another, which had been decided since, meaning that of *Lowe v. Jolliffe* above stated, wherein his Lordship said, it had been determined at a trial at bar, that three subscribing witnesses to an instrument might be permitted to deny the validity of it.

But when the question came before the court on a motion for a new trial (his Lordship still adhering to his former opinion) it was said by Buller J. that "the case before them was very different from that of witnesses to a will. The indorser had passed that *negotiable* instrument to the plaintiff as a good and valid security, and it would be attended with consequences most injurious to society, if these securities might be cut down by the persons passing them; it was only for two men to conspire together to cheat all the world." It is remarkable, that in the much considered case of *Bent v. Baker*, which was determined three years before that of *Adams v. Lingard*, Lord Kenyon expressed his entire acquiescence in the distinction as to this point, between negotiable instruments, and deeds and wills.

The reader has been shewn above, that the testimony of one of the three witnesses is enough to prove a will of lands, in a court of common law. He will find the same rule of evidence laid down in early cases with respect to the mode of establishing a will

Of the proof to establish a will of lands in courts of equity.

in the courts of equity. Thus in the case of *Longford v. Eyre*<sup>c</sup>, Lord Macclesfield makes the following observation : “ The proper way of examining a witness to prove a will as to lands, is, that the witness should not only prove the executing the will by the testator, and his own subscribing it in the presence of the testator, but likewise, that the rest of the witnesses subscribed their names in the presence of the testator ; and then *one witness proves the full execution of the will*, since he proves that the testator executed it, and likewise, that the three witnesses subscribed it in his presence.”

The settled rule now is, that all the witnesses, if living, must be examined.

But in the case of *Townsend v. Ives*<sup>b</sup>, which came on about twenty-five years afterwards in the Court of Chancery, where the bill was preferred by the legatees, whose legacies were charged on the real estate, to have the will established, the rule was peremptorily laid down, that ALL the witnesses, if living, must be examined, to prove a will of lands. Thus also Lord Camden, in the above cited case of *Hindon v. Kersey*, in speaking first of the method of proof in a court of common law, says, “ one witness is sufficient to prove what all the three have attested ; and though that witness must be a *subscriber*, yet that is owing to the general common law rule, that where a witness has subscribed an instrument, he must always be produced, *because he is the best evidence*. This we see in common experience ; for after the *first* witness has been examined, the will is always read.” But the same judge speaking afterwards of the course of the Court of Chancery in this respect, expresses himself thus : “ Sanity is the great

<sup>c</sup> 1 P. Wms. 741.

<sup>b</sup> 1 Wils. 1748.

fact which the witness has to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce* in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that Court, never to establish a will, unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of those, whom the statute has placed about his ancestor.”<sup>1</sup>

But if one of the witnesses be dead, a will may be read, on proof of his hand-writing, though this must be accompanied by positive and satisfactory proof, that he is dead. Thus in *Bishop v. Burton*<sup>k</sup>, the plaintiff being put to prove the will, the proof was of the hands of the deviser, and of two of the subscribing witnesses, who were proved to be dead; and as to J. B. the third subscribing witness, the witness deposed, that he was credibly informed in the country where he lived, and believed it to be true, that he died two years before, and believed his name subscribed was his proper hand-writing. But the Court was of opinion, that *that* was not sufficient proof to have the will read in evidence.

If one of the witnesses be dead, proof of his hand-writing may be read.

In *Grayson v. Atkinson*<sup>l</sup>, an objection was made for the defendant, that one of the witnesses being beyond sea, and the others not having sworn that the

Whether the hand-writing may be proved

<sup>1</sup> See *Ogle v. Cook*, 1 Vez. 177. all must be examined or a reason given why any one is not. And see *Harris v. Ingledew*, 3 P. Wms. 92. But in *Powell v. Cleaver*, 2 Bro. C. C. 504. Lord Thurlow said the practice had been so; but he doubted whether the rule had ever been laid down so largely.

<sup>k</sup> Comyns Rep. 614.

<sup>l</sup> 1 Vez. 459.

where a  
witness is  
beyond  
sea.

testator acknowledged his hand-writing to the third, who was abroad, and there being no proof about him, the will could not be established: on the other side it was contended, that the same credit was to be given to his hand-writing *as if dead*. But the Lord Chancellor Hardwicke doubted thereof, and said, "he did not know that it had been determined, that the same credit was to be given to the hand-writing of a witness beyond sea, as if dead, because it was not necessary to presume the impossibility of getting at him, and he was apprehensive fraud might be used." (3)

In the case of *Lord Carrington v. Payne*<sup>m</sup>, however, a question was made, whether, one of the witnesses to the will being abroad, in Jamaica, it was necessary to send out a commission to examine him. His hand-writing was proved; and the other two witnesses were examined. Lord Alvanley, then the Master of the Rolls, held that it was not necessary to have his examination; but that *it was the same as if he was dead*. But his Honour seemed to found this resolution on the submission of the heir, who, he observed, did not make a point of it. He mentioned a case, however, where one of the

<sup>m</sup> 5 Vez. jun. 411.

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(3) To obviate the inconvenience which may arise from the death of witnesses a bill may be filed in a court of equity to perpetuate the testimony, in which the complainant prays leave to examine the witnesses, to the end that their testimony may be preserved and perpetuated. The object of the bill is to preserve testimony for future litigation, and is properly brought when the party is in undisturbed possession, and where he has no present opportunity of proving the will against the heir at law.

witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad. And where, in another case before Lord Chancellor Thurlow, it was argued that one of the witnesses to the will was abroad, his Lordship said<sup>a</sup>, he doubted whether the rule had ever been laid down so largely as, that the will *could not* be proved, without examining *all* the witnesses, although the *practice* has been to examine all.

This rule has been relaxed in other instances, where, to have rigidly adhered to it, would have imposed impossibilities upon persons coming into equity to establish these instruments. As, where a witness to a will of real estate had since become insane, proof of the hand-writing of such witness was allowed<sup>o</sup>. And in a very late case at the Rolls, proof even of the hand-writing was dispensed with, in the case of an old will, which appeared by the date to have been made 30 years before, the testator having been dead above 20 years, and no account being to be obtained of one of the subscribing witnesses. The hand-writing of two of the witnesses was proved: and his Honour observed, that he did not see how a will could be distinguished from a deed as to this point; only that the former, not having effect till the death, wanted a kind of authentication which the other had. That was from the nature of the subject. But he thought the proof sufficient in that case; for in a late case (3) in the Court of King's Bench, an

The hand-writing of a witness, who since the subscription has become insane, may be proved.

And in the case of an old will, where no account can be given of a witness, proof of the hand-writing may be dispensed with.

<sup>a</sup> 2 Bro. C. C. 504.

<sup>o</sup> Bennet v. Taylor, 9 Vez. jun. 381.

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(4) *Cunliff v. Sefton*, 2 East. 183. where in an action upon a bond, evidence was offered that diligent inquiry had been made



inquiry of just the same kind was held sufficient, which excluded the question. In that case they had made all inquiry, and could hear nothing of the witness.

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## SECTION XVII.

### *Personalty.*

WITH respect to personal estate, except the will be made and proved according to the forms required by the 19th, 20th, and 21st sections of the statute, to validate the nuncupative testament, or where it is the case of soldiers in actual military service, (who by virtue of the 23d section of the said statute, may still make nuncupative wills without the necessity of observing the forms to which nuncupative testaments are subjected by the preceding clauses,) all testamentary dispositions thereof must, since the statute of frauds, be in writing.

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after one of the subscribing witnesses, at the places of residence of the obligor and obligee, and that no account could be obtained of such a person, who he was, where he lived, or of any circumstance relating to him, it was held sufficient to let in proof of the *hand-writing of the other subscribing witness*, who had since become interested as administratrix to the obligee, and was a plaintiff on the record.

The Ecclesiastical Courts, to whose jurisdiction the establishment of personal testaments appertain, require no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. Swinburn seems to have considered it necessary, indeed, that a testament of chattels should be published in the presence of two sufficient witnesses<sup>a</sup>; and Bracton<sup>b</sup> appears to have held the same opinion; or rather, according to Sir William Blackstone, to have copied implicitly the rule of the civil law. For it is not to be doubted, but, that a will of personal estate, if written in the testator's own hand, though it has neither his name nor seal to it, *nor witnesses present at its publication*, is effectual, provided the handwriting can be sufficiently proved<sup>c</sup>. And though it be written by another person, by the testator's direction, without even having been signed by the testator, if it can be shewn to have been made according to such instructions, and to have received the approbation of the testator, it will be effectual to pass the personal estate<sup>d</sup>.

The proof of the will may be in two forms, of which the one is called the vulgar or common, the other is termed the solemn form, or form of law. If the will be not contested, the executor or administrator *durante minore ætate*, or *durante absentia*, or *cum testamento annexo*, may prove it by his own oath, or as it is said, in some dioceses in York, with the additional oath of *one* witness, before the ordinary or his surrogate. But if the validity of the will

Of proving a will in the common and solemn form.

<sup>a</sup> Vid. Swinb. on Wills, pt. 1. sect. 3.

<sup>b</sup> Lib: 2. c. 26.

<sup>c</sup> Godolph. O. L. p. 1. c. 21.

<sup>d</sup> Limbery v. Mason and Hide, Comyns, 452. Gilb. Rep. 260.

be disputed, it then becomes necessary to prove and establish the will in the solemn way, or, as Swinburn expresses it, in form of law ; that is, *per testes*, in the presence of such persons as would be interested if the deceased had died *intestate*. Two witnesses must then be sworn and examined upon interrogatories administered by the adverse party. Between which two forms of proving a will, there is a substantial difference of effect, for after an informal proof the executor may be compelled again to prove the will in due form of law, which may be inconvenient if the witnesses are dead in the mean time. The executor may, therefore, if he please, for greater safety, if he himself have an interest in the will, elect to have the will proved in the more solemn form<sup>e</sup>, and in such case he must cite the persons who would be interested under an intestacy, to be present at the probation thereof. If the will is only proved in the *common form*, it may at any time within 30 years be disputed<sup>f</sup>, but if the solemn form be pursued, and no adverse proceedings are instituted within the time limited for appeals, the will is liable to no future controversy<sup>g</sup>.

When a will is proved by the probation of the more formal or solemn kind above alluded to, the civil law rule of establishing all proof upon the testimony of two witnesses, is followed in our Ecclesiastical Courts. And such witnesses must be able, at least, to depose, that the testator declared the writing produced to be his last will and testament, unless where the will or codicil was written by the testator

<sup>e</sup> Burn. Eccl. L. 208.

<sup>f</sup> Godolph. O. L. 62.

<sup>g</sup> 4 Burn. Eccl. L. 207.

himself ; in which case, as has been above observed, the validity thereof may be established upon proof of the hand-writing only, but it ought to be by the evidence of such as have seen him write<sup>b</sup> ; and though this evidence ought, in general, to be given by two witnesses, yet, if there be one subscribing witness, who appears to attest the fact of the identity of the will, the testimony of a single witness is said to be sufficient. And where the will has been wholly written by the testator, and there are corroborating circumstances, the clear testimony of one witness has prevailed in the spiritual court. The general necessity for the evidence of two witnesses is borrowed from the Roman law ; the maxim of which is, that one witness alone cannot be heard, or, in other words, is no witness at all<sup>c</sup>. “ *Unius responsio testis omnino non audiatur* (1).”

Of the general necessity for two witnesses to establish a fact in the Ecclesiastical Courts.

We have seen, that notwithstanding the rule of the Roman law, that *nemo testis esse debet in propria causa*, legataries were permitted to give evidence in support of a will, upon the distinction between particular and universal successors ; but that by the practice of the Ecclesiastical Courts of this kingdom, no

<sup>b</sup> See the case of *Eagleton v. Kingston*, 8 Vez. jun. 438.

<sup>c</sup> See the case of *Thwaites v. Smith*, 1 P. Wms. 13.

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(1) Cod. 4. 20. 9. Where the Ecclesiastical Court proceeds in a matter merely spiritual, or confined to their own jurisdiction, no prohibition lies, if their proceedings are contrary to common law ; as if they refuse the testimony of one witness. But if they disallow the proof of a temporal matter, by one witness, though such temporal matter be incident to a matter within their jurisdiction, a prohibition lies from the temporal courts. 1 Show. 158, 172. *Shatter v. Friend*, and see H. H. C. L. 5th edit. and the note (q) by the Editor.

legatee could be received to give his testimony to establish a will of personal estate, until his interest had been removed by his receipt of the value of his legacy, or until he had renounced it, and discharged the executor.<sup>k</sup>

Of the  
form of the  
testament.  
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But as to the *form* of the instrument itself, the Ecclesiastical Courts are not scrupulous. A memorandum or scrap of paper, written<sup>l</sup> by a person in contemplation of death, and with a design to make it operative after that event, may be proved in that court as testamentary; and, if so received, it seems a court of equity will support it. A string of examples might be cited to illustrate this observation; many were produced in the case of *Limbery and Mason v. Hyde*; <sup>m</sup> among which that of *Loveday v. Claridge* is strong to the purpose.

Determinations of  
the Ecclesiastical  
Courts on  
this subject.

The testator intending to make his will, pulled a paper out of his pocket, and wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draft which he intended afterwards to finish, (for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to pay a dividend of stocks;) yet it was held to be a will.

Thus too, in a case where a woman possessed of considerable real and personal property, wrote a letter to an attorney, her friend, giving him an account how she would dispose of the same, and in her ignorant way, added, “ *please not to put this rigmaroll*

<sup>k</sup> Vide *supra*, p. 135.

<sup>l</sup> Vid. *Cox v. Basset*, 3 Vez. jun. 158.

<sup>m</sup> Com. 452. and see *Downing v. Townsend*, Ambler 280. 592.

*in till I find it correct—this only by way of memorandum in case I should go off suddenly,”* and the testatrix survived the writing of that letter three or four months, but took no further steps therein, Sir George Hay was of opinion, that, under the circumstances, such letter could not operate as the will of the deceased; but on an appeal, the Court of Delegates reversed his sentence.

In *Cobbold v. Bowes*, a gentleman gave instructions to his attorney to prepare his will for the disposition of his real and personal estate. The will was accordingly prepared; settled by the testator and engrossed for execution with the usual clauses of attestation. This will was of considerable length, and at the left-hand corner of each sheet of paper was the word ‘*witnesses.*’ Upon the death of the deceased, the will was found with his name subscribed to each sheet, and, opposite to the seal, on the last sheet, but not witnessed. Dr. Calvert, the then judge of the Prerogative Court, was of opinion, that the deceased, *by permitting the clause of attestation to remain*, had bound himself down to a formal execution, and therefore pronounced against the will; but on appeal, the Court of Delegates reversed such sentence, and thereby rendered the will valid as to personal property (2).

To the same effect was that of *Wright v. Walthoe*, cited in *Limbery v. Mason*<sup>a</sup>, where there were three

<sup>a</sup> Com. 452.

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(2) See these cases more at large in a note by the Reporter to the case of *Matthews v. Warner*, 4 Vez. jun. 200.

testamentary schedules, whereof one was without date ; to the second the words ‘ *in witness* ’ were subjoined ; and the third concluded abruptly ; yet being written by the testator, they were declared to be his will. In the same manner, and about the same time, *viz.* in the year 1711, in a case of *Worlick v. Pollett*, before the Delegates, where the testatrix had sent for a person to make her will, and given him instructions for the same, and the will was accordingly drawn, read to, and approved by her, and declared by her to be her last will, and three witnesses were sent to see her execute, the words signed and sealed being already written, but she died before any other execution, it was held a good will before the Delegates, who affirmed the first sentence which had been reversed upon an appeal.

And again, in a cause of *Brown v. Heath*, determined in 1721, where a will of real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution ; yet it was held a good will of the personal estate, and though more was intended to be done, yet it was adjudged that it should be good for what was done.

But the later determinations at Doctors Commons seem tending to establish a stricter doctrine. It now appears to be agreed, that if a testator leaves an instrument, which, upon the face of it, carries evidence of an intention in the framer to perfect it by some further solemnity, which he died without having superadded, having had afterwards sufficient time and health and recollection to complete it, such paper may be inferred not to have been

intended to operate as it stood, and the omission to perfect it may ground a presumption of a change of mind in the deceased. Thus, also, where a person had written a paper, purporting to be a disposition of his property, to which a clause of attestation was added, but not filled up, sentence has been pronounced for an intestacy upon an inference, from this omission, of change of intention.

Griffin v. Griffin (3), determined at the Commons a few years ago, was decided upon similar principles. Richard Griffin executed a testamentary paper, dated 27th September 1777. On the 18th of January 1789, he began a paper, and having written no more than the commencement of what he meant to do, being called away to dinner, he locked up the paper. On the 27th of the same month he died suddenly, while sitting on the bench as a justice of the peace. The questions were, whether this unfinished paper was a revocation of the former paper executed in 1777: or, whether it was to be established substantively, and conjunctively with the former paper. It was determined, that the unfinished paper could have no effect; the testator having lived eight days after making it, in health and capable of business; and not having concluded it, the presumption of law, even if there had been no other paper, would have been, that he never meant to finish it; or that it was intended only as a draft for consideration; and the case was still stronger as there was an executed paper.

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(3) Cited in *Matthews v. Warner*, 4 Vez. jun. 197. note (a) and see *ex parte Fearon* 5 Vez. jun. 644.



Of the principle on which the Courts act in receiving or rejecting informal papers as testamentary.

The same doctrine is recognized by Lord Eldon, in the late case of *Coles v. Trecothick*, who thus expresses himself on the point: "The observation is just, that as to personal estate, if it appear upon the will, that something more was intended to be done, and the party was not arrested by sickness or death, that is not held a signing of the will." It seems, therefore, to be now understood, that not *every* scrap of paper which a man writes in contemplation of death, making mention of intended dispositions of his personal property, will be received in the Ecclesiastical Court as testamentary; but it must appear, and that from the paper itself, and not from extrinsic evidence, that the writer intended the paper to operate as it stood when it was written, without contemplating any *farther act* to be done to give to it its perfection and full authenticity; and this intention, every such paper, if it contains dispositions of personal property prospectively to the decease of the party, will be held to import, unless by its mode of expression or manner of execution, it discloses a suspended intention in the party framing it.

But the further act intended to be done, must be such as denotes a suspension of the actual intention to make an operative disposition. In the case of the will of William Huntingdon, the late dissenting minister of Providence Chapel in Gray's-Inn-Lane, an attorney had taken down the dispositions of his property from the mouth of the testator, and afterwards read them over to him, and the same were approved by him, and a fair copy directed to be made

and brought to him the next morning to be executed as a will, but the testator died in the course of the night. Dr. Nicholl held this circumstance, of the direction to the attorney to make a fair copy, and bring it next morning to be executed, as conclusive of his having fully made up his mind on the subject of his will, and accordingly pronounced for the validity of the testamentary paper, and refused the application on the part of the next of kin, to have the costs paid out of the estate.

It seems hardly necessary to say, (the proposition being implied in what has gone before,) that the paper must appear to be written with the actual design of disposing after death of the property in question. There must be the *animus testandi*, which is rendered in the 'Touchstone', by the expressions of "a mind to dispose—a firm resolution and advised determination to make a testament; for it is, says that book, the *mind*, not the *words*, which doth give life to the testament." Therefore, continues the same author, "if a man rashly, unadvisedly, incidentally, jestingly, or boastingly, and not seriously, write to say, that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no testament, nor to be regarded" (4). Upon the

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(4) A case recently decided at the Commons, raised the question of the *animus testandi* upon a very singular state of facts. It was a proceeding relative to the will of T. N. deceased, an attorney, which was propounded on the part of his two children, who were the universal legatees named in it, and opposed by the widow. N. had been in habits of intimacy with K., they having frequent occasion to transact business together, the former as the solicitor,

whole, therefore, the mind and intention seems to be every thing—the manner nothing. Insomuch, that if

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and the latter as the steward of Sir C. M. Upon these occasions they were in the habit of ridiculing the general prolixity of legal instruments, and of trying their skill in framing them with the greatest possible brevity. On the 30th of July 1803, (the date of the will in question,) N. and K. dined together, and after dinner K. handed a paper into N.'s hands, saying, "it was his will, and asking him if it was not a valid one." N. answered, that it was a very good will, and immediately took a sheet of paper and wrote the will in question in these terms: "I leave my property between my two children; I hope that they will be virtuous and independent, and that they will worship God and not black coats." He then signed it, and giving it to K. said, "There, there is as good a will as I shall probably ever make." After he was gone, K. signed his name as a witness, and put the paper among some papers of his own. N., who was then a widower, afterwards married the defendant.

In the testator's last illness, K., who stated himself to have forgotten the transaction in question, urged him to make his will, to which he answered that "he did not know but that the law would make as good a disposal of his property as he should; but that when he got better he would, in compliance with the desire of his friend, make his will."

N. died of this illness, and the paper in question was the only paper of a testamentary kind found among his papers. Sir J. Nicholl was of opinion, that if the above facts were to be received on the evidence of K., he must pronounce against the will, as wanting the *animus testandi*. He was of opinion that the evidence ought to be received. The evidence of such a witness, however, when in derogation of his own act, should be received with extreme caution. The testator did not appear to intend that it should be witnessed by K., and gave no directions for its preservation. Neither does it appear that he ever made any mention of the paper in question; and his declarations, during his illness, rather indicated an intention to die intestate unless he got better. The court, therefore, though exercising every caution as to the evidence of a witness in derogation of his own act, felt itself bound to pronounce against the will.

a testator, by a paper, subsequent to his will, says he has bequeathed personal property, which in fact he has not bequeathed, the paper may be proved as testamentary, and the property may pass by it<sup>a</sup>. And even an indorsement on a note, "I give this note to A." it is said may be proved as testamentary<sup>r</sup>. But it is worthy of observation, that where a testator had left five testamentary papers, inconsistent with each other, and probate of all had been granted in the Spiritual Court, Lord Eldon regretted that there was no solemnity necessary for personal estate, and observed that he thought it would be expedient to apply the provisions of the statute of frauds to this description of property<sup>s</sup>.

Dispositions by nuncupative testaments, where the estate bequeathed exceeds the value of 30*l.*, are laid by the statute of frauds under many restraints. The clauses of the statute relating to the matter, are as follow :

" XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury, (2) be it enacted by the authority aforesaid, That, from and after the aforesaid four and twentieth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof ; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or

Nuncupative wills.

Explained by 4 Ann. c. 16. s. 14.

<sup>a</sup> 6 *Ve.* jun. 397.

<sup>r</sup> 4 *Ve.* jun. 565. *Chaworth v. Beech*, and see 3 *Ve.* jun. 160.

<sup>s</sup> 5 *Ve.* jun. 280. *Beauchamp v. Lord Hardwicke*, 4 *Ve.* jun. 208.

some of them, bear witness, that such was his will, or to that effect ; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

“ XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

Probates  
of nuncu-  
pative  
wills.

“ XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired ; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.”

Sir William Blackstone observes<sup>1</sup> that the legislature has provided against frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse ; and is hardly ever heard of but in the only instance where favour ought to be shewn to it,—when the testator is surprised by

<sup>1</sup> Comm. 2 vol. 500.

sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, and, as the same learned writer observes, not in any loose idle discourse; for he must require the bye-standers to bear witness of such his intention. The will must be made at home, or among his family or friends, unless by unavoidable accident, to prevent impositions by strangers. It must be in his last sickness; for if he recovers, he may alter his dispositions, and has time to make a written will. It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience or surprize.

It is to be remarked, that the words in this clause are, that "no nuncupative will shall be good, that is not *proved by the oaths of three witnesses at the least*, that were present at the making thereof; whereby the construction is excluded, which, we have seen, has allowed the publication of a written will of lands to be established by the proof of any one of the three subscribing witnesses. Dr. Shallmer<sup>\*</sup>, by will in writing gave 200*l.* to the parish of St. Clement Danes: and afterwards, Prew, the reader, coming to pray with him, his wife put him in mind to give 200*l.* more towards the charges of building their church: at which, though Dr. Shallmer was at first disturbed, yet afterwards, he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember what he had said to him the day before, and died that day. Within three or four days after, the Doc-

And of the  
degree of  
evidence.

<sup>\*</sup> Phillips v. the Parish of St. Clement Danes, 1 Eq. Ca. Abr. 404.

tor's widow put down a memorandum in writing of the said last devise, and so did her maid. Prew died about a month afterwards, and amongst his papers was found a memorandum of his own writing, dated three weeks after the Doctor's death, of what the Doctor said to him about the 200*l.* and purporting that he had put it in writing the same day it was spoken; but that writing which was mentioned to be made the same day it was spoken, did not appear; and these memorandums did not precisely agree.

About a year afterwards, on the application of the parish to the Commissioners of Charitable Uses, and their producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the 200*l.* But on exception taken by the executors, the decree was discharged of this 200*l.* and the Lord Chancellor held it not good, because it was not proved by the oath of three witnesses: for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only three to be present, but that the *proof* shall be by the *oath* of three witnesses.

A nuncupative will not be pleadable till probate.

Until probate has been obtained of a nuncupative will, it cannot be set up in pleading against the administrator, as appears by the case of *Verhorn v. Brewen*<sup>2</sup>, where an administrator brought a bill to discover and have an account of the intestate's estate; and the defendant pleaded, that the supposed intestate made a *nuncupative will*, and another person executor; to whom he was accountable, and not to the plaintiff, as administrator. But it was decreed, that though there were such a nuncupative will, yet it was

not pleadable against an administrator before it was proved.

No nuncupative disposition, though made and published with the due formalities prescribed by the 19th and 20th sections, can make any alteration in a written will, by reason of the restriction in this particular contained in the 22d clause of the statute. Yet if a legacy given by a written will has lapsed, or was void for some legal objection, such legacy might be the subject of a nuncupative disposition. Thus, where one G. S. (5) on the 2d of September, 1679, made his will in writing, and appointed E., his wife, his executrix, and gave all the residuum of his estate, after some legacies paid, to her, and the wife died in the testator's life-time, who afterwards made a nuncupative codicil, and gave to another all that he had given to his wife, and died, and the single question was, whether this nuncupative codicil was allowable, notwithstanding the 22d section of the statute of frauds; it was resolved by Sir Hugh Wyndham, Justice, Sir Thomas Raymond, and several civilians joined in the commission, that the nuncupative codicil was good; for, by the death of the wife before the testator, the devise of the residue was totally void, and so there was no will as to that part.

*Of altering a written will by a nuncupative disposition.*

The nuncupative codicil was, therefore, in the foregoing case, a new disposition as to the residue, because, as to so much there was no will, its operation being determined. And it was objected, that, by the same reason, if any part of a will in writing was made

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(5) Sir Thomas Raymond, 334. before the Delegates at Serjeant's Inn, December 9, 1679.



by force or fraud, the thing so given and specified in that part, may be devised by a nuncupative codicil, and so the will might be altered contrary to the words of the statute : but it was answered by the Court, that if such part of a will was so obtained, it was no part of the will, and so such codicil would be no alteration of what was not, but would be an original will for so much. And they further said, that if A. be possessed of an estate of 1000*l.* and by will in writing, gives a part of it as 500*l.* to B. he might give the residue by a nuncupative will, so as he did not change the executor.

It has been held, that a disposition, not valid as a nuncupative will, for want of the observance of the formalities required by the statute, may be supported as a trust in equity. The case cited in support of which proposition, is that of *Nab v. Nab*<sup>j</sup>, where a daughter, having deposited 180*l.* in the hands of her mother, made her will, and gave several legacies, and made her mother executrix, but took no notice of the 180*l.* ; but afterwards, by word of mouth, desired her mother, if she thought fit, to give the 180*l.* to her niece ; and on a bill filed by the niece for this sum, it was proved in the cause, for the plaintiff, that the daughter, after making the will, had said, she had left her niece 180*l.* as a legacy, but the parol declaration of the daughter appeared only by the answer of the mother upon oath.

It was agreed, that this was not good as a nuncupative will, being above 30*l.* and not reduced into writing within six days after the speaking, as the statute of frauds requires. But the mother was decreed to be a trustee for the niece. I find no other case that comes up to this doctrine, and, perhaps, the courts

will not hereafter, if the point should arise, be disposed to be guided by a single precedent, so opposite to that feeling of regret which, of late, they uniformly express in being forced into a departure from the plain and wholesome provisions of the statute, by the stress of authorities.

By the 23d section of this statute, soldiers in actual military service, and mariners and seamen at sea, are excepted out of the clauses restraining the testamentary power, in respect to personal estate. Of soldiers' and seamen's wills. Soldiers may still, therefore, make nuncupative wills, or revocations of personal estate, and dispose of their goods, wages, and other chattels, without the forms required by the law in other cases. And by statute 5th William 3. c. 21. sect. 6. the probate of any common soldier, was and continues to be exempted from the duties imposed by that act. With respect to seamen, however, the power of making nuncupative wills left to them by the statute of frauds in the unfettered state in which it stood previously to that statute, has been laid under restrictive provisions by subsequent statutes, for their better security and protection against fraud and imposition. The regulations which regard this object will be found in the abstracts of the statutes, 26 Geo. 3. cap. 63. and 32 Geo. 3. cap. 34. subjoined to this volume, for the convenience of reference.

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## SECTION XVIII.

### *Charitable Uses.*

A GIFT in mortmain was a phrase signifying a donation of lands or tenements to corporations, sole or aggregate, and implying that by such a gift as well Statutes of mortmain.

the fruits of tenure due for such property to the Lord of the fee, as the services due out of such fees for the defence of the realm, became extinguished and lost, and the lands were as unproductive as if they were in the hands of a dead man. By Magna Charta it was therefore provided, that “ it should not be lawful for any one to give his lands to any religious house, and to take the same again to hold of the same house ; nor should it be lawful to any house of religion to take the lands of any, and to lease the same to him from whom they received it. And if any from thenceforth should give his lands to any religious house, and thereupon be convict, the gift should be utterly void, and the land should accrue to the Lord of the fee.”

A great many subsequent statutes became necessary to defeat the devices of the ecclesiastics, (who, in early times, were the persons most learned in the law,) the object of which was to elude restraints which went in a great measure to cut up the sources of their wealth and accumulations. Thus the statute *de religiosis*, 7 Ed. 1. st. 2. after reciting the prevailing artifices whereby the former prohibition had been evaded, ordained that “ no person, religious or other, whatsoever he be, should buy or sell any lands or tenements under the colour of gift or lease, or receive by reason of any other title, whatsoever it be, or by any other craft or engine, lands or tenements, under pain of forfeiture of the same.” But this statute being held to extend only to gifts, alienations, and other conveyances, the ecclesiastics evaded it, by pretending title to the land which they were desirous of obtaining, and so recovering it in an action, by collusion with the tenant<sup>a</sup>. By the 13th Ed. 1. c. 32. they were precluded from acquiring lands by

<sup>a</sup> 2 Inst. 75.

purchase, gift, lease, or *recovery*; whereupon they resorted to the method of causing the lands to be conveyed to other persons and their heirs, to the use of them and their successors; which answered for some time, till by the statute 15 Ric. 2. c. 5. this was also enacted to be mortmain, and within the forfeiture of the statute de religiosis. But as the statute of Richard was held only to extend to *corporations*, the statute 23 H. 8. c. 10. carried the prohibition to parish churches, chapels, guilds, fraternities, commonalties, companies, or brotherhoods, without corporation.

But it still continued to be held<sup>b</sup> that lands might be given to any persons and their heirs, for the finding of a preacher, maintenance of a school, relief of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging the poor inhabitants of a town of common charges, for the making of a stock for poor labourers in husbandry and poor apprentices, and for the marriage of poor virgins, or for any other *charitable uses*. And it was further held, that by obtaining proper licences from those who would be entitled to the forfeiture (1), alienations in mortmain might still be made, as appears from the preamble of the stat. de

<sup>b</sup> 1 Rep. 26.

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(1) These grants in mortmain were never avoided so as to let in the heirs at law; but the title by the forfeiture was given to the King or the mesne lords. The Statute of Wills, 32 H. 8. c. 1. gave a general power of devising, but the explanatory act, 34 H. 8. c. 5. excepted corporations; so that devises to corporations were *void*, and could not be dispensed with by *licence*; and by consequence let in the *heir*, from the passing of the stat. of 34 H. 8. c. 5. to the 43 El. c. 4. except where there happened to be a custom for devising in mortmain. See the Year Book, 45 Ed. 3. 26.

religiosis<sup>c</sup>. The Kings of England for the most part grounded their pretensions to this power of licensing on the right, asserted by them to be inherent in the crown, to dispense with Acts of Parliament: which dispensing power was found to produce such dangerous consequences in the exercise thereof by James II. that in the first year of the reign of William it was enacted, that no dispensation by non obstante to any statute should be allowed, but that the same should be held void and of none effect, except a dispensation be allowed in such statute<sup>d</sup>. But by the subsequent statute 7 and 8 William 3. c. 37. power to licence in mortmain was expressly given to the crown, and the 2d and 3d Anne, c. 11. enabled any person, by deed enrolled, to give to the corporation for augmenting the maintenance of the poorer clergy, lands or goods, without licence.

By the 43 El. c. 14. special provision was made by Commissioners, to be named by the Lord Chancellor or Chancellor of the duchy of Lancaster, within the county palatine, to enquire by the oaths of twelve men into all charitable gifts and appointments, and the management and application of them, and to make orders and decrees concerning their administration: which statute was construed to supply all defects of assurances, where the donor was of a capacity to dispose, and had an estate in any way disposeable by him: as if a copyholder disposed of copyhold lands to a charitable use, without surrender, or tenant in tail conveyed without fine, or a reversion was granted without attornment, all such like defects were sup-

<sup>c</sup> 2 Inst. 74. and see the statutes 18 Ed. 3. st. 3. c. 3. 17 Car. 2. c. 3.

<sup>d</sup> 4 Hawk. P.C. 348. Harg. Co. Litt. 120. n.

plied by this statute, and considered as good by way of appointment (2).

The Court of Chancery will relieve by original bill upon a gift to charitable uses within the statute ; and, proceeding on the principle of the statute, has shewn great favour to charitable donations. Thus a legacy given *generally* to a *public charity* has been considered as sufficiently certain, and the executors have received the directions of the Court as to the disposal of it°. And where a charge of 1000*l.* on a manor was to be applied to such charitable uses as the testator had by writing under his hand directed, equity supported the bequest, though no such writing was found<sup>f</sup>. Thus also where there was a gift of the residue of personal estate to such charitable uses as the *executor* should appoint, though the executor died in the life-time of the testatrix, the devise was carried into effect<sup>g</sup>. And a devise to charitable uses, declaring no use, has been supported ; in which case the King appoints under his sign manual<sup>h</sup>. So also where the charity has been against the policy of law, the same prerogative holds ; as where it was

Charitable gifts ; favour shewn to them.

° 1 Bro. C. C. 13. *Widmore v. the Governors of Queen Anne's bounty.*

<sup>f</sup> 1 Vern. 224. *Attorney General v. Syderfin.*

<sup>g</sup> 3 Bro. C. C. 517. *Moggridge v. Thackwell.*

<sup>h</sup> Ambler 712. *Attorney General v. Herrick.*

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(2) That devises to corporations were under that statute considered good by way of appointment, See Hob. 136. Moor, 888. 1 Lev. 284. But note that the words 'limit and appoint' in the statute did not carry the legal estate, but operated only as a gift of the utile dominium, to bind the legal estate in the hands of the heir.

to establish a jesuba to teach the Jewish religion<sup>1</sup>; or to educate poor children in the Roman Catholic faith<sup>2</sup>. And where a charity has been so given as that there can be no objects of it, it seems that the Court will order a different scheme to be laid before it<sup>3</sup>. Thus where a trust was created for the propagation of the Christian religion, among the natives of New England, there being no infidels to convert within the intended limits, and the colleges which were appointed to administer the charity having become subject to a foreign power, the master was directed to propose a plan *de novo* for the application of the produce of the estates according to the general intentions of the testator<sup>m</sup>. Thus also, upon the same principle of favour, where a residue of personalty is left to charitable uses, which proves to be more than sufficient for the object, if it appear to be the testator's intention to dispose of the whole surplus that way, the remainder will be applied to similar purposes<sup>n</sup>. The Court is also very indulgent to charity cases in matter of form. Thus where the information prays a wrong relief, the Court will give such relief as will do justice<sup>o</sup>, and holds out its assistance to charities under circumstances in which it would not give relief in ordinary

<sup>1</sup> Ambl. 228. *Da Costa v. De Pas*. Reg. lib. A. 1754, fol. 309.

<sup>2</sup> 7 Vez. Jun. 490. *Cary v. Abbot*.

<sup>3</sup> 3 Bro. C. C. 166. *Attorney General v. Oglander*.

<sup>m</sup> 3 Bro. C. C. 171. *Attorney General v. the City of London*.

<sup>n</sup> 3 Bro. C. C. 373. *Attorney General v. the Earl of Winchelsea*. See this doctrine of *cy pres* as applied to the execution of a charitable use, where the express object fails, in 7 Vez. Jun. 324. *Bishop of Hereford v. Adams*, 11 Vez. Jun. 367. *Attorney General v. Whitely*; and see Digest xxxiii. Tit. 2. *de usu et usufructu legatorum*.

<sup>o</sup> 1 Vez. 12. 43. 413. 11 Vez. Jun. 247.

cases<sup>p</sup>, and often gives the relators costs beyond the taxed costs<sup>q</sup>.

The statute 9 Geo. 2. c. 36. enacts, “ that from the June 24, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever ; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be made by deed, indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death) and be enrolled in his Majesty’s High Court of Chancery, within six calendar months next after the execution thereof ;

Statute of  
Geo. 2.  
called the  
Mortmain  
Act.

<sup>p</sup> 11 Vez. Jun. 367. And as to the extent and comprehension of the term ‘ charity ’ in a proper legal sense, and what description of objects are brought within the same indulgence, see 10 Vez. Jun. 522. *Morice v. Bishop of Durham*, and the case of *Downing College*, in *Wilmot’s* opinions and judgments. See also *Duke*, Ch. 10. sect. 2. for the adjudged cases on the great enabling statute, 43 El. c. 4. wherein the writer expounds what is a good charitable use within that statute. See also *Poph. 139*.

<sup>q</sup> 7 Vez. Jun. 425.



and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such grantor or donor, (including the days of the transfer and death) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." And by the 3d section, all gifts or transfers made in any other manner or form than is directed by this statute, are declared to be void. By the 2nd section, gifts or transfers for valuable consideration actually paid, and bona fide made, are excepted. The 4th section provides that the Act shall not extend to make void the dispensations of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this Act is directed, to or in trust for either of the two universities, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundations of the same colleges. But by the succeeding section these colleges are restrained from holding or enjoying more advowsons than shall be equal in number to a moiety of the fellows or persons stiled or reputed as fellows, or where there are no fellows or persons reputed as fellows, to a moiety of the students on the foundation, not computing advowsons given for the better support of the headships of any of the said colleges in the number.

In the case before Lord Hardwicke, of the Attorney General *v.* Weymouth<sup>\*</sup>, his Lordship stated with great distinctness the purview of the statute. "It is insisted," said his Lordship, "that the true intention of the Act was, according to its title, to restrain the disposition of lands, whereby they became unalienable; and that this was the only intention of the Act. But I think the intention of the Act is taken up much too short; for the title is no part of the Act, and has often been determined not to be so, nor ought it to be taken into consideration in the construction of this Act; for originally there were no titles to the Acts, but only a petition and the king's answer; and the Judges thereupon drew up the Act into form, and then added the title; and the title does not pass through the same forms as the Act itself, but the speaker, after the Act is passed, mentions the title, and puts the question upon it: and therefore the meaning of this Act is not to be inferred from the title, but we must consider the Act itself. It first takes notice that gifts and alienations of lands in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility; and then it proceeds, that nevertheless this public mischief has greatly increased, by many large and improvident alienations or dispositions, made by languishing or dying persons, or by other persons, to uses called charitable, to take place after their death, to the disherison of their lawful heirs. The reason of this statute was to hinder gifts by dying persons out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls, to give their lands to charities, which they paid no regard to in their life-time; and therefore

Lord Hardwicke's exposition of the purview of the Mortmain Act.

<sup>\*</sup> Ambl. 20. and see the *Collectanea Juridica*, 433.

the Act of Parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed executed a year before the death of the grantor, and enrolled within six months after execution. The legislature blended the two inconveniences together: the act of languishing and dying persons and the disinheritance of heirs" (3).

Devise of  
lands to be  
sold, and  
the money  
to go to a  
charity,  
within this  
act.

In this case of the Attorney General *v.* Lord Weymouth, the devise was of land to be sold, and the residue of the money after payment of debts, &c. was to go to a charity. And though such a devise does in contemplation of equity usually convert the real into personal property, yet as the statute had expressly provided not only that lands themselves should not be given to charitable uses, but that they should not be charged or incumbered for such purposes, a devise of lands to be sold and the money to be laid out in charitable uses, was considered as within *both* prohibitions, for here the lands were devised expressly for the ultimate object of a charity, and furthermore these lands were charged for a charitable use. It was to be considered too, that it was a gift of the rents and profits till a sale; and how long such sale might be postponed nobody knew; for no man had a right to compel the trustees to sell, if they paid the debts and legacies, but the charity; so that being a devise of the rents and profits it was in effect a devise of the

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(3) The statutes of mortmain, and the law as to perpetuities, were sufficient before the statute, 43 El. c. 4. to prevent lands from being rendered unalienable. The 43 El. c. 4. revived the power as to charitable uses; and for preventing the abuse of this only method remaining of granting in perpetuity, the statute 9 G. 2. c. 36. was enacted.

lands themselves. And as to the devise of the money arising from the sale, it was not thought necessary to the determination of the question upon the statute, to say whether it should be considered as a devise of the land or of money. If the Act were not in the way, the persons intitled to the residue might come and pray to have the land in that Court instead of the money, and might have retained it as land; and as the testator had given them the profits till sale, he had made them owners in equity of the estates. But it was not necessary to rely upon these grounds, since, whether the thing devised were considered as land or money, for the reasons above-mentioned the devise was void.

So likewise although a mortgage is considered as personal estate in equity, and a term of years is personal both at law and in equity, yet a devise of such subjects for a charitable use is not good within this statute, the words being, that the *lands* shall not be conveyed or settled *for any estate or interest whatsoever, or any ways charged or incumbered in trust or for the benefit of any charitable use*\*. So neither can money secured upon tolls or by assignment of poor rates or county rates, pass under a bequest to a charity, for they all come out of the realty<sup>†</sup>, and the same doctrine has prevailed in respect to a lease under the Crown of the right to lay mooring chains in the river Thames<sup>‡</sup>.

Mortgages, terms of years, and money secured on tolls or rates, not devisable in mortmain.

Money given to be laid out in lands is within the Money given to be

\* 2 Vez. 44. Att. Gen. v. Meyrick. Ambl. 155. Att. Gen. v. Graves.

† 10 Vez. Jun. 41. French v. Squire.

‡ Ambl. 367. Negus v. Coulson.

laid out in  
lands,  
within  
the words  
of the act.  
Excep-  
tions.

words of the Act ; but where a bequest was made to charitable uses to be secured by the purchase of lands of inheritance *or otherwise*, it was determined that such devise was good by force of the words *or otherwise*. For if a devise in a will is in the disjunctive and leave to the executors two methods of doing a particular thing, the one lawful and the other prohibited by law, the Court cannot say, that because one method is unlawful, the other is so too, and therefore the whole bequest is void. If one is lawful that *must* be pursued and take effect. And though some stress at the bar was laid upon the words in the will directing the benefit to be *for ever*, yet the Lord Chancellor would not allow any weight to the objection ; and he mentioned that there might be annuities not payable out of land that might have probable continuance in perpetuum, as Sir Thomas White's charity, which was a disposition of money to be employed in continual rotation in loans of several sums to poor tradesmen for stated periods, and any man might by will give a perpetual charity in this manner at this day. And the words heirs and assigns import no necessity for a purchase of lands ; upon which part of the argument his Lordship said he would suppose that an obligor bound himself, his heirs, executors, and administrators, in a sum of money to a Papist, who obtained judgment on the bond and took out an *elegit*, in such case it had been held at the assizes that the Papist could not maintain ejectment, and yet the bond was good to bind the person of the obligor and his representatives, but not to charge his lands, or his heirs who represented him in his landed capacity.

Money bequeathed to the corporation of Queen Anne's bounty, because, by the 16th rule of that cor-

poration, it is to be placed out in the public funds till laid out in proper purchases of *lands*, was in one case held within the Act\*. But in *Grayson v. Atkinson*†, where a testator gave 40*l.* to be applied towards procuring Queen Anne's bounty; and till that could be obtained the interest of the same was to go towards augmenting the curate's salary; though the rule of the commissioners of the bounty was, that if any body will give 200*l.* they will add 200*l.* more, the whole to be laid out in land; Lord Hardwicke thought it hard to extend the statute of mortmain to that case; and as the testator had not expressly directed the money to be laid out in land, he would consider it as a legacy of money, and direct it to be laid out in the funds; which, he said, would not prevent the end designed of procuring the Queen's bounty; for the commissioners might, nevertheless, lay out their proportion of the augmentation money in land: the secretary to the commissioners having reported that though the rule was as above stated, yet there was another rule or bye-law—that the donations of testators should have effect.

Upon similar principles to those which prevailed in the last-mentioned cases, it has been determined (4) that where a man devised money to a charity, and

\* *Ambler*, 637. *Widmore v. Woodroffe*.

† 2 *Vez.* 454.

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(4) *Grimmett v. Grimmett*, *Ambl.* 210. *Collectanea Juridica* 1 Vol. 454. But in the case of *Grieves v. Case*, 4 Bro. C. C. 67. *Ashhurst and Eyre*, Lords Commissioners, held that a direction to place money *at interest*, until an eligible purchase of land could be made, was holden to be within the statute. And they observed that *Grimmett v. Grimmett* turned upon a very nice criticism of the expression.

directed it to be laid out in the public funds, till the whole could be laid out in lands to the satisfaction of his trustees, such devise was not within the statute under consideration : for though, if a person directed money to be laid out in lands to a charitable use, it would be void, yet in this case the Court would order the money to be placed in the funds till the purchase was made. And so also where a man gave it in such a manner as that the land to be purchased was the final end of the thing given, yet where there was sufficient room for the Court to say there was a discretionary power in the trustees to lay out the money one way or another, either in the funds or in lands, such devise ought to be held good upon the same principle on which the case of *Soresby v. Hollins* was decided. Here the direction was to lay out the money in the funds until it could be laid out in lands to the satisfaction of the trustees. When could that be ? Not while the statute of 9 Geo. 2. was in force. To do so would be to act in opposition to their trust. And in a late case in the King's Bench where there was a devise to trustees, of land to be applied by them and their successors, and the ministers for the time being of a Methodist congregation, as they should from time to time think fit ; it was clearly held not within the statute, and that the trustees might recover at law, however the Court of Chancery might afterwards direct the application of the fund<sup>2</sup>.

A devise for the support or repair of what is already in mortmain, good.

To support that which at the time of the will was in mortmain, having been originally given before the statute, is held to be a legitimate object of a will ; as where a bequest was made of 200*l.* to repair a free

<sup>2</sup> 6 East, 328. *Doe on dem. Toone and West v. Copestake.*

chapel<sup>a</sup>; but ground cannot be purchased for the purpose of erection<sup>a</sup>. It has also been decided that where before the statute a testator devised the whole profits of an estate to a charity, if the rents at any time after the statute should be increased, they must go to the increase of the charity<sup>b</sup>.

But in a case<sup>c</sup> where money was given to build a church where a chapel stood, and the Bishop dissented, the same favouring maxims which seem to have prevailed in many other cases where the object has failed, were not adopted by Sir Lloyd Kenyon, Master of the Rolls, who refused to apply the money towards repairing, or otherwise, saying that the intention must be implicitly followed, or nothing could be done. And in the case of *Mog v. the President of Bath Hospital*<sup>d</sup>, though Lord Hardwicke said, that since the statute of mortmain, 9 Geo. 2. c. 36. he had endeavoured to give charitable legacies effect as far as he could (5); yet he would not set up new rules

<sup>a</sup> Ambl. 651. *Harris v. Barnes*, same *v. Nash*.

<sup>a</sup> Ambl. 751. *Att. Gen. v. Hyde*. 3 Bro. C. C. 588.

<sup>b</sup> Ambl. 190. *Att. Gen. v. Johnson*. Ambl. 201. Same *v. Sparks*, and see 7 Vez. Jun. 340.

<sup>c</sup> 1 Bro. C. C. 444. *Att. Gen. v. Bishop of Oxford*. See also 2 Bro. C. C. 428.

<sup>d</sup> 2 Vez. 52.

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(5) Where a sum of money was left towards establishing a school, Lord Loughborough thought that though under this disposition he could not direct any part to be laid out in land or building, yet the master might teach in his own house or in the church. And he ordered a scheme to be laid before the Master in Chancery which would not include the application of any part of the dividends to the purchase or renting of land. 4 Bro. C. C. 526. *Att. Gen. v. Williams*.



Assets not  
marshalled  
in favour of  
a charity.

to avoid that statute. And his Lordship refused to marshal assets in favour of a charity, or, in other words, to throw the debts and legacies on the real estate, in order that the personal estate might be applied to the charitable use\*. And though in the Attorney General *v.* Caldwell<sup>f</sup>, where a testator willed the residue of his personal estate consisting of his effects, annuities, *mortgages*, bonds, and notes, to be sold, and the produce given to a charity, the devise of the mortgages being void, the court ordered them, as being part of the residue only, to be first applied in payment of debts, so as to leave a larger fund for the charity, yet Sir Lloyd Kenyon, in a subsequent case<sup>g</sup> declared he could not recognize the distinction between a specific gift of a mortgage, and a gift of a residue in which it is comprised. In both cases it was an interest in land which could not pass by the statute, but must go in favour of the parties legally intitled to the benefit of it. And he ordered the debts, legacies, and costs of the suit, to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage pro rata, and the residue of the mortgages to go to the next of kin.

It never has been doubted since the statute of Geo. 2. that a plain direction in a will to purchase land for a charitable use is void by the statute. But a bequest of money to be laid out in repairing what was already in mortmain, or even in building upon land already consecrated and appropriated, as in or towards re-building a church or a parsonage-house, has been determined to be clear of the statute

\* 2 Vez. 52. Ambl. 614. 4 Bro. C. C. 153. <sup>f</sup> Ambl. 635.

<sup>g</sup> Att. Gen. *v.* Earl of Winchelsea, 3 Bro. C. C. 373.

above-mentioned<sup>h</sup>. And it seems that if a bequest of money be made, to be disposed of to a charitable use, leaving the mode of disposition undefined, there is nothing in the statute to restrain the trustees from laying out the money in the purchase of land, since by the 2nd section of the last-mentioned statute, purchases for valuable consideration are expressly saved. But if there is occasion for coming into a Court of Equity for direction, that Court will not direct a purchase of land. Lord Hardwicke's opinion, as expressed by him in the case of *Vaughan v. Farrer*<sup>i</sup>, was, that a bequest of money for erecting a hospital or school, was not within the mortmain Act; because it did not necessarily follow that any new purchase of land should be made for the purpose, which might have been equally well accomplished by building upon land already in mortmain, or by a gift of land, or by hiring a house. In another case<sup>k</sup> it was said that such a bequest to erect a school was good if any piece of ground already in mortmain, or as a mere gift from private generosity, could be procured. But in a subsequent case<sup>l</sup> where the circumstance of there actually being a piece of land in mortmain in the parish where the charity was to be erected was much insisted upon, Lord Apsley, Chancellor, said, that directions in a will to erect a school-house in general imports an intention to purchase; and though it appears that there is a vacant piece of ground in the parish, the will does not point at that piece of ground. It does not say to repair or build a

Where the mode of disposition is undefined, it seems a purchase may be made for value by the trustees.

<sup>h</sup> 2 Vez. 189. *N. Brodie v. the Duke of Chandos*, 1 Bro. C. C. 444.

<sup>i</sup> 2 Vez. 187.

<sup>k</sup> *Att. Gen. v. Bowles*, 2 Vez. Jun. 547.

<sup>l</sup> *Att. Gen. v. Hyde, Ambler*, 751.

school-house on that piece of ground. And his Lordship dismissed the information,

A bequest  
to erect im-  
ports a  
purchase.

Other cases have been equally opposed to *Vaughan v. Farrer*, and the Attorney General *v. Bowles*. And the doctrine seems now to be settled that a bequest to erect<sup>m</sup> a charitable foundation imports prima facie, that land is to be bought, unless the testator by his will manifests his purpose that it is to be otherwise procured, or expressly adverts to land already in mortmain<sup>n</sup>. The case of *Chapman v. Brown*<sup>o</sup>, in which there was a trust for building or purchasing a chapel, where it might appear to the executors to be most wanted, and if any overplus, it was to go to a faithful gospel minister, not exceeding 20*l.* per annum, and if any further surplus, for such charitable uses as the executors should think proper; though standing by itself, a bequest of a residue to such charitable purposes as the executors should think proper was a good bequest, yet the whole trust was declared void: for the bequest to purchase was clearly void by the words of the Act; the trust to *build* had been also established to be within the Act; that bequest therefore fell to the ground: then the bequest on behalf of the minister, as being clearly intended for a minister of the chapel so directed to be built, could not stand as the thing failed with which it was inseparably connected<sup>p</sup>. And lastly, although standing

<sup>m</sup> Lord Hardwicke seemed to think that to *erect* might be taken as meaning to found or endow.

<sup>n</sup> 8 *Vez. Jun.* 191. *Att. Gen. v. Parsons*; and see 3 *Bro. C. C.* 588.

<sup>o</sup> 6 *Vez. Jun.* 191.

<sup>p</sup> 1 *Vez.* 534. *Att. Gen. v. Whorwood*. See 10 *Vez. Jun.* 534.

by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper is a good bequest ; and supposing it had been, legal to bestow the money as testatrix had directed in the two first instances, after such purposes had been answered, there would have been a good bequest of this residue, yet as the prior bequest had failed which was to constitute this residue, and as it was impossible to ascertain how much would have been employed in building the chapel, and no direction could be framed for the master to proceed upon on a reference to him, the testatrix having given no ground for inferring what kind of chapel was intended, this ulterior bequest was held to be void for uncertainty ; and the real estate was decreed to the heir at law, and the personal to the next of kin (6).

Where property is left generally in trust for charitable uses without defining them, the Court of Chancery will uphold such a trust as a valid bequest, but then the application either by the trustees, or the Crown, must be to purposes expressed in the statute 43 El. c. 9. or purposes analogous. If the charitable purposes are defined in the will, they must be such as the law recognizes as charitable purposes. But a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, cannot be supported as a charitable

How general charitable bequests, without any specification of the objects, are dealt with in equity.

And what the legal notion is of charitable purposes.

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(6) The trust of an annuity for a charity charged upon a devised estate being held void under this statute, it was ruled that the annuity did not pass by the residuary disposition, but sunk for the benefit of the specific devisees, 12 Vez. Jun. 497. But note, there was an express exception out of the residue of what he had before disposed of.

legacy, but would be void for uncertainty. Liberal-ity and benevolence do not correspond with the legal notion of charity, and not coming within the compass of that term do not attract the same indulgence with which general charitable bequests have been treated by the court. And therefore, in the case of *Morice v. the Bishop of Durham*<sup>a</sup>, where the bequest was in these terms, it was decreed a trust for the next of kin. For it was clear that a trust was intended, and wherever that is the case, and the trust is ineffectually created, or fails, the next of kin becomes intitled; but if no positive trust is intended to be created, but the devise leaves a discretion in the devisee to make the application or not, it is then considered as an absolute gift; for then the particular application pointed at is an act referred to the will of the devisee, and not imposed as an obligation by the testament. And though words of recommendation and desire may impose a trust and be considered as imperative, yet that can only be where the objects are certain.

In a word, the indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the court as evidence, that the mind of the testator was not to create a trust.

I shall conclude this subject with noticing three important points in respect to the clause in the statute concerning colleges, determined by Lord Keeper Henley<sup>r</sup>, viz. that a devise, not to the whole body corporate, but for the benefit of particular fellows, is

<sup>a</sup> 10 Vez. Jun. 522.

<sup>r</sup> Case of Christ's College, Cambridge, 1 Sir W. Blackst. 90.

good within the exception. That a devise to colleges as trustees for other charitable uses, is void by the statute. And that the exception extends only to colleges already established when the statute of mortmain was enacted.

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## SECTION XIX.

*Appointment of Guardians by Will.*

THE principal object of the statute 4 and 5 Philip and Mary was to prevent the practice of taking away or marrying maidens under 16, against the consent of their parents, but as Mr. Hargrave (1) has observed, the statute prohibited it in terms which implied that the custody and education of such females should belong to the father and mother, *or the person appointed by the former*. But this statute applied only to the case of *female* children. The object of giving to the father this appointment, was more generally provided for by the statute 12 Car. 2. c. 24, sect. 8, 9, which enacts, that “ where any

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(1) See Hargr. Co. Litt. 89, a. (14). The reader is referred to the notes of this gentleman on the Commentary upon Littleton, for a most able and instructive investigation of the learning respecting the several sorts of guardianship known to our law.

person shall have any child or children under the age of 21 years, and not married at the time of his death, it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time in ventre sa mere, or whether such father be within the age of 21 years or at full age, by his deed executed in his life-time; or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the custody and tuition of such child or children, during such time as he or they shall respectively remain under the age of 21 years, or any lesser time, to any person or persons, in possession or remainder, other than popish recusants: and such persons to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward or trespass against any person who shall wrongfully take away or detain any such child, for the recovery of such child, and recover damages for the same, in the same action for the use and benefit of such child. And such person to whom the custody of such child shall be so disposed or devised, may take into his custody to the use of such child, the profits of all lands, tenements and hereditaments of such child, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child till his or her age of 21 years, or any less time, according to such disposition aforesaid, and may bring such actions in relation thereto, as by law a guardian in common socage may do.

Before entering upon the consideration of this statute of Charles, it seems proper to make a few ob-

servations on the guardianships at common law and by custom.

By the custom of the province of York (which custom the statute of 12 Car. 2, being general, does of course controul wherever they are in opposition) the father, by his last will and testament, might for a time commit the tuition of his child and the custody of his person; which testament and appointment was to be confirmed by the ordinary, who was to carry the same into execution. And upon the omission of the father to exercise his power, the mother might, after his death, make a similar appointment. And as the statute confines the power of appointing a testamentary guardian to the father only, the custom still operates within its local extent, to give an authority to the mother in respect to the personal estate (to which only the custom extends) which she would not possess by virtue of the statute. The statute of Charles the second has no negative words to restrain the custom in this respect.

Guardians  
at common  
law and by  
custom.

By the same statute whereby the father's power of appointing a guardian of his children by will was created, the tenure by knight's service, out of which the guardianship by chivalry arose, was abolished, and with it fell to the ground this dominion of lords over the heirs of their tenants, which was as inconsistent with the rights and duties of nature, as the principles of rational and liberal policy. For this guardian was not accountable for the profits made of the infant's land during the wardship; and though he is said to have been subject to the duty of maintaining the infant, it does not well appear by what means he



was to be compelled so to do, in a manner agreeable to the fortune and rank of such infant. This guardianship existed rather for the interest and profit of the guardian, than as a trust for the benefit of the ward, and was saleable, transferable, and transmissible like any other property.

The other descriptions of guardianship by nature—by nurture—and that arising out of socage tenure, still subsist, though very little is now heard of them in our courts, since this office is usually assigned under the statute above-mentioned; and where that is neglected to be done, the jurisdiction of the Lord Chancellor, now established, though of dubious and obscure origin, is generally resorted to. These three last-mentioned kinds of guardianship are all exercised with a responsibility for the profits of the estate. If an estate were left to an infant, his parent, by the common law, might be his guardian by nature. And even while the tenure by knight's service continued, the father, claiming this guardianship by nature, was entitled to the custody of the infant's *person*, even against the lord in chivalry, which was a privilege not given by the law to the mother when happening to be guardian by nature, as she might in some cases be. The father and mother may also be the guardians by nurture, where that species of guardianship is let in by the want of any other superior claims, for it only takes place where the infant is without any other guardian. This extends no further than to the custody, and government of the infant's *person*, and determines at 14 in both males and females; when, if no other guardian is appointed by the choice of the infant or otherwise, the interval between 14

and 21 seems to fall under the guardianship by nature ; as appears likewise to be the case after the guardianship by socage expires, which is also at 14 in both males and females.

The guardianship in socage can only take place on a descent like the guardianship by chivalry, and arises only where the infant is seised of lands, or other hereditaments lying in tenure. The title to it is in such only of the infant's next of blood as cannot be inheritors, according to the laws of descent in real property, to the socage estate, and is not restricted to the whole blood. And the quality which principally distinguishes this guardianship from the guardianship in chivalry is, that it is a personal trust wholly for the benefit and interest of the infant. The power of this guardian over personal estate has been doubted ; but the learned annotator on the treatise of equity has observed, that the custody of the person should seem to draw after it the custody of every description of property for which the law has not otherwise provided : which idea, he adds, receives countenance from the instance of copyholds and inheritances not lying in tenure being placed by the law in the hands of this guardian ; and he further remarks that this opinion is strongly confirmed by the manner in which the 12 Car. 2. c. 24. regulates the powers of the guardian which it enables a father to appoint, for that statute authorizes such guardian to take the custody of the infant's personal estate, as well as of his lands, tenements, and hereditaments, and provides that he may bring such action or actions in relation thereto, as by law a guardian in common socage might do \*. Yet, there is an expression of Lord Chief Justice

\* Fonbl. Treat. Eq. 3d. Ed. p. 242.

Vaughan<sup>b</sup> which conveys a different opinion ; for, speaking of the guardian under the statute, he says, "this new guardian hath the custody not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the infant, which the guardian in socage had not."

But this guardianship, as all others which might otherwise take place at the death of the father, is superseded by the exercise of the power given him by the statute 12 Car. 2. c. 24. which professedly proceeds upon the model of the guardianship by socage.

Testamen-  
tary ap-  
pointment.

Under this statute it is clear upon the words that none but the father can appoint, and it is held equally clear according to the sense, that the guardian appointed by him cannot appoint another guardian ; for it is a personal trust, and not assignable<sup>c</sup>.

The power as to its objects is held to be confined to *legitimate* children, (in which are included those in ventre sa mere,) and by the words of the statute these must be under 21, and unmarried, at the decease of the father. It extends not to illegitimate children, though such, if females, have been held to be within the statute of Philip and Mary (2).

<sup>b</sup> Vaugh. 186.

<sup>c</sup> Vaugh. 179.

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(2) See *Strange*, 1162, *Rex v. Corneforth*. But the court will, unless there is some objection, adopt the nomination of the father. 2 Bro. C. C. 583. *Ward v. St. Paul*, and note. So it seems also if the appointment be not made agreeably to the statute. *Dick*. 527. *May v. May*.

If the will be made merely for naming a guardian under this statute, and for no other purpose, such will need not be proved in the spiritual court; for as in such case the appointment takes effect solely by force of the statute, the temporal courts are the proper judges thereof<sup>d</sup>. But if the will contains also dispositions of the personalty, it seems that the whole will must be proved, which probate will be effectual so far as the personalty is concerned, but of no avail in respect to the appointment of guardian. And it seems to be immaterial by what words the appointment is signified, if the meaning sufficiently appears<sup>e</sup>.

Probate not necessary to the validity of the appointment under the statute.

If the father exercises his power of appointment under the statute by deed, as he may, yet it has been held that such disposition by deed may be revoked by will<sup>f</sup>. But no appointment can be revoked by a subsequent testamentary appointment, unless it be executed according to the statute, or directly import to be a revocation; which has been determined in analogy to the cases on this part of the statute of frauds<sup>g</sup>.

Appointment may be made by deed. And such appointment is revocable by will.

But such will must be executed as the statute directs.

Where the appointment has been made, the guardianship shall not be determined by the marriage of the infant before 21, for the statute declares that such guardianship shall continue during the time that he shall remain under 21. The father, though under age himself, may appoint by virtue of this statute, and though he could not devise the land in trust for the

Infancy of the parties.

<sup>d</sup> 1 Vent. 207. *Lady Chester's Case*.      \* Swinb. p. 3. c. 12.

<sup>e</sup> Finch's Rep. 323. *Lord Shaftesbury v. Hannam*.

<sup>g</sup> Vid. post. *Revocation of Wills*. Chap. II. sect. 1.

infant directly, yet the land will follow as an incident by law attending upon the custody of the heir<sup>a</sup>.

**Remedies.** The guardian when regularly appointed under this statute takes place of all other guardians, and may have a writ of ravishment of ward if the infant be taken from him, as the guardian by knight's service, or by socage, might have had at common law, and shall recover damages as for the ward's benefit<sup>1</sup>.

This guardian being constituted upon the model of the socage guardian, and coming in the place of the father, has an interest joined with his trust, though not an interest for himself<sup>2</sup>. But though it was agreed in the case of *Parry v. Hodgson*<sup>3</sup>, that a testamentary guardian by the statute, until the infant was 21 years, had the same interest as a guardian in socage till the infant was 14; yet it was holden that a testamentary guardian could not make a lease of the infant's land, but that such lease was absolutely void.

**Powers of  
a testamen-  
tary guar-  
dian.**

It seems he may pay out of the rents and profits the interest of any real incumbrance, and even the principal of a mortgage<sup>m</sup>, but it has been held that he is not compellable to apply the profits of the infant's estate to pay off the bond debts of the ancestor<sup>n</sup>. Nor can he, without the direction of the court, convert the real into personal or the personal into real estate<sup>o</sup>. He is subject to an action of account as soon as his guardianship is at an end, but not before, for

<sup>a</sup> Vaughan, 187.

<sup>1</sup> 2 Wils. 129. 135.

<sup>2</sup> See the case of *Mr. J. Eyre v. the Countess of Shaftesbury*, 2 P. Wms. 103.

<sup>m</sup> Prec. in Ch. 137.

<sup>n</sup> 2 Vern. 606.

<sup>o</sup> 1 Vern. 403. 435.

<sup>p</sup> Vaughan, 181. 2 P. Wms. 122.

the rule of the common law is, that an action of account does not lie while the guardianship continues. However, in equity, the infant may, by *prochein ami*, sue his guardian for an account during the minority. That court, it is said, often gives extrajudicial directions for an infant, and hears a person as *amicus curiæ*. And it was observed, by Lord Hardwicke, that in Lord Macclesfield's time, in the case of Lord Dudley, a stranger came and complained of the abuse of the infant's estate by the guardian; and upon this application, and his undertaking to pay the costs, the court directed the master to examine the receiver's accounts, and see whether the infant was wronged or not<sup>p</sup>. By the statute 4 Anne, c. 16. actions of account may be brought against the executors or administrators of guardians. But a guardian is entitled to all his reasonable costs and expences; and, therefore, he ought not to be charged as receiver, because then it seems he would lose these costs and expences, but as guardian, by name; for costs, it is said, are in general allowed only to guardians or bailiffs, as such, and not to mere receivers<sup>q</sup>.

<sup>p</sup> Earl of Pomfret v. Lord Windsor, 2 Vez. 484. See also 2 P. Wms. 119. 3 Atk. 625.

<sup>q</sup> 1 Freem. 178. 1 Leo. 219. and see the statute 4 Anne, c. 16. sec. 27.

## SECTION XX.

*Statute of fraudulent Devises.*

A DEBTOR by specialties might, by devising his lands, have deprived his specialty creditors of all remedy against this part of his property, until the statute 3 and 4 William and Mary, c. 14. was passed. But by this statute, "reciting that it was not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, it was enacted that all wills and testaments, limitations, dispositions, and appointments of or concerning any manors, messuages, lands, tenements, and hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person, at the time of his or her decease, should be seised in fee simple in possession, reversion, or remainder, or have power to dispose of the same by his or her last will and testament thereafter to be made, should be deemed and taken, only as against such creditor or creditors as aforesaid, his, her, or their heirs, successors, executors, administrators, and assigns, and every of them, to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect."

And by section 3. "for the means that such creditors may be enabled to recover their said debts," it was enacted, "that in the cases before-mentioned, every such creditor or creditors should and might have and maintain his, her, or their action of debt upon his, her, or their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees jointly, and

such devisee or devisees should be liable and chargeable for a false plea by him or them pleaded, or for not confessing the lands or tenements to him descended."

And by section 4. it was enacted, " that where there should be any limitation or appointment, devise or disposition, of or concerning any manors, &c. for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person other than the heir at law, according to or in pursuance of any marriage contract, or agreement in writing, bona fide made before such marriage, the same and every of them should be in full force ; and the same manors, &c. should be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as should be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, should be raised, paid, and satisfied."

And, lastly, it was enacted, " that all and every devisee and devisees made liable by that act, should be liable and chargeable in the same manner as the heir at law, by force of that act, notwithstanding the lands, tenements, and hereditaments to him or them devised should be aliened before the action brought."

This statute, in respect to this part of its provisions, may be considered as suppletory to that of the



13 Elizabeth, c. 5. against fraudulent conveyances, and as designed to extend the remedy to fraudulent devises.

It has been determined that an action of covenant does not come within the remedy given by this statute, which is confined to cases of debt; for though the word specialties is used as well as bonds, yet when the means of recovery are provided, the intention of the statute is plainly confined to debts, and those specialties on which an action of debt lies. The statute speaks throughout of debts, and a breach of covenant cannot be considered as a debt. The statute prescribes the means by which such creditors shall recover their debts, and in prescribing those means it only gives the action of debt<sup>a</sup>.

Of the excepting clause, saving devises and dispositions for payment of debts.

This Act contains, as appears from what has been above recited, a clause saving the effect of such devises and dispositions as are for the payment of debts, which clause has been held to operate simply as an exception, leaving the case of a devise for the above purpose, as well as provisions of portions for children in pursuance of marriage contracts, entirely unaffected, and open to the same remedy and resort as before the statute<sup>b</sup>. Since at common law there was no remedy against a devisee for payment of debts, such a case always was and still continues to be, since the statute, the subject of equitable jurisdiction, and accordingly the assets are equitably distributable, that is, equally and *pari passu* amongst all the creditors, whether by specialty or simple contract.

<sup>a</sup> 7 East 128. *Wilson v. Knubley*.

<sup>b</sup> 2 Atk. 292. *Plunket v. Penzon*.

A devise for payment of debts out of the rents and profits only, has been clearly held within the exception\*. And it appears to have been the opinion of Lord C. J. Willes, that by virtue of the above-mentioned clause, a devise for the payment of any particular debt upon simple contract is a good devise against bond creditors<sup>d</sup>.

If a devise for payment of debts does not provide for it in a practicable manner, the case is not within the exception\*. But since the case of *Bailey v. Ekins*<sup>e</sup>, the rule appears to be settled, that if the provision made by the will for the payment of debts be effectual, either at law or *in equity*, the case is out of the statute: so that if the will, instead of breaking the descent by a regular devise, only charges the estate with the debts of the testator, this provision is good notwithstanding the statute of fraudulent devises, and a court of equity will act upon it; which is the same thing as to say that the interest so provided, and which equity draws out of the mass going to the heir, is distributable as equitable assets, among all the creditors equally, and without any regard to the precedency of specialty creditors.

*Extends to charges of debts in equity.*

Lord Hardwicke in *Plunket v. Penson*<sup>f</sup>, seemed to be of opinion, that it was necessary the descent should be broken to make the assets equitable; and that if the estate were suffered to descend charged to the heir, or if the heir were made the

*Assets—whether equitable or legal.*

\* 2 Atk. 104. *Ridout v. Earl of Plymouth.*

\* Willes 524. *Gott v. Atkinson.*

\* 2 Brown, Ch. Rep. 614.

\* 7 Vez. Jun. 319. and see 8 Vez. Jun. 26. *Shephard v. Lutwidge.*

\* 2 Atk. 290.

trustee (1), the descent being unbroken, the assets should be considered as legal assets; distinguishing such case from that of the devise of an estate to a stranger charged with the payment of debts which by breaking the descent would make the assets equitable<sup>a</sup>. But Lord Eldon, in the late case of *Ekins v. Bailey*, observed, that the rule cannot be accurate when it is stated that the descent ought to be broken.

If we suppose a devise to trustees in trust to pay debts, and all the trustees to die in the life-time of the testator, the estate must descend upon the heir, but it is clear the assets would be equitable. By the failure of the devise, the heir must have it, as the trustees would have had it, subject to the debts; and yet the descent is not broken (2).

<sup>a</sup> See 1 P. Wms. 430. *Freemoult v. Dedire*.

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(1) A devise giving lands as the law would give it, in case there were no devise, is inoperative and void; and therefore if the legal estate be devised to the heir in trust, the descent of the legal estate is unbroken, and the devise has merely an equitable operation. See *Hedger v. Rowe*, 3 Lev. 127. But if the quality of the estate be altered, the descent is broken; as if the devise create a joint-tenancy or tenancy in common, where the descent would carry the estate in coparcenary. 3 Lev. 128. Hob. 30. But merely charging the estate does not break the descent. See 2 Lord Raym. 820. *Reading v. Rawsterne*. But if a mere trust estate descend it will be legal assets, since a trust estate descending is made assets by the statute of frauds. But, it seems, an equity of redemption of the fee, not being so converted by that statute, is considered as equitable assets. 2 Atk. 294. 3 P. Wms. 342.

(2) These devises are greatly promoted in equity. A devise of lands for payment of debts was formerly held to include those upon which the statute of limitation had run, 2 P. Wms. 373. and see 3 P. Wms. 89. Cowp. 548. 2 Vern. 141. *Goston v. Mill*. But this general doctrine appears to have undergone some modification;

The action, by the express direction of the statute, must be brought against the heir and devisee jointly. And courts of equity hold themselves equally bound by the statute in this respect, and insist upon the heir's being made a party to the proceedings; for it is only by the Act that the property becomes assets in hands of the devisee, and as that statute requires the heir to be a co-defendant, the remedy must be followed as it is prescribed, and a bill in equity is as an action at law. Perhaps, if the heir could not be found, the bill might charge that the plaintiff had made enquiry, and could not discover the heir<sup>1</sup>.

Proceedings at law and in equity upon the statute.

If the heir happen to be made a joint devisee with

<sup>1</sup> 1 P. Wms. 99. *Gawler v. Wade*. 2 Atk. 125. *Warren v. Stawell*. For the proper form of declaring against the heir and devisee jointly. See *Clift's Entries*, 243. pl. 19.

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and the distinction seems to be between those debts in respect to which the period has already been completed in the testator's life, which are still to be presumed to be paid; and those upon which the statute has not run; which are not subject to be barred by its running after the death of the testator; for the trustee's neglect shall not prejudice the creditor. *Executors of Fergus v. Gore*, Ca. temp. Lord Redesdale, 107. Where debts are directed to be paid out of rents and profits, the court will, if necessary, decree a sale. *Berry v. Asham*, 2 Vern. 26. Though perhaps it is otherwise if out of the annual rents. 1 Vern. 104. So equity will supply the want of a surrender of a copyhold to the use of the will, if it is devised for payment of debts, as it will for a wife or children unprovided. 2 P. Wms. 490. 12 Vez. Jun. 216. The doctrine of election does not prevail against creditors taking benefit under a devise for payment of debts, and disputing the will in other respects, *Kidney v. Coussmaker*, 12 Vez. Jun. 136.

others, then the action should be against the heir and devisees jointly, charging the heir both as heir and devisee. Supposing the estate be limited to several in succession by the devise, it seems proper to make them all defendants in respect of their estates; as where property is devised to go in strict settlement, making a tenant for a life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the tenant for life in tail; it would be prudent, if not absolutely necessary, to make the heir together with the tenant for life, the trustees to preserve, and the son or sons of the tenant for life, parties; and as the sons do not claim by descent, the parol could not demur. It is said, indeed, to be the general rule that where a devise is fraudulent under this statute, and the heir thereby becomes subject to the action, together with the devisee, by virtue thereof, if such heir is an infant the parol cannot demur<sup>k</sup>.

Of the estate pur auter vie under this statute.

In respect to estates pur auter vie it should be observed, that as by the statute of frauds, 29 Car. 2. c. 3. sect. 12. an estate pur auter vie, which comes to the heir as special occupant, is made assets by descent and devisable by a will in writing signed by the deviser, and attested in his presence by three or more witnesses; so a devise of such an estate is also held to come within the statute of fraudulent devises, and to be void against specialty creditors<sup>l</sup>.

<sup>k</sup> See 1 Vez. 27. *Beaumont v. Thorp*, and as to the mode of pleading by the heir and devisee, see *Gott v. Atkinson*, Willes, 527.

<sup>l</sup> See 3 Atk. 465, *Westfaling v. Westfaling*.

## CHAP. II.

## REVOCATION OF WILLS.

## SECTION I.

*Construction of Sect. 6. of the Statute of Frauds.*

**BEFORE** the statute of 29 Car. 2. wills in writing of real estates might be revoked by parol; and, indeed, after that statute, such power would still have existed, (as we may conclude in analogy to the doctrine of holding written agreements revocable by parol notwithstanding the 4th section,) if by the 6th and 22nd sections, special provisions had not been made to prevent it. Thus it is held in regard to the 12 Car. 2. c. 24. giving power to the father to appoint a guardian of his child, that the appointment under that statute may still be revoked by an instrument made *expressly* for that purpose without any attestation; because no positive provision was made against it by that statute\*.

Much has been said on the difference in the penning of the 5th section of the statute respecting the execution of a will of lands, and of the succeeding section which prescribes and restricts the methods of

\* See 7 Vez. Jun. 376, 377. *ex parte Ilchester*, ante, 239.

revocation. At the end of the case of *Right v. Price*<sup>b</sup> in Douglas's Reports, the learned Reporter has added a note, in which he has animadverted upon the difference in the language in the two clauses, which he attributes to inaccuracy in the composition of the Act; and it cannot be denied, that the variation in the terms, where the same principle must have governed, seems hardly explainable, but by imputing a mistake to the legislature. By the 5th section, the testator is not required to *sign in the presence of the subscribing witnesses*, but the subscribing witnesses are called upon to attest *in the presence of the testator*. And Mr. Douglas observes in the note alluded to, that he believes it is universally understood, that, to satisfy this 5th section, a testator must sign in the presence of the witness.

But by what has been above produced to the reader on this subject, it must have sufficiently appeared to him, that such actual signature, in the presence of the witnesses, is not held to be requisite, and that it is enough, if the testator acknowledges his handwriting to the signature, or publishes and declares it to be his will, when the witnesses subscribe their attestations.

By the clause respecting revocations, the subscription of the witnesses is not expressly directed, while, on the other hand, the signing by the testator in the presence of the witnesses, is positively prescribed. The clause runs as follows: " And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time, after the

<sup>b</sup> Dougl. 241.

said four-and-twentieth day of June, be revocable, otherwise than by some other will, or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent ; but all devises and bequests of lands and tenements, shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions in manner aforesaid, or unless the same be altered by some other will, or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same ; any former law or usage to the contrary notwithstanding.”

It may reasonably be inferred to have been the intention of the legislature, to impose the same obligation as to the formalities of execution, on all wills properly so called, whether original or coming in the place of others antecedently made. The construction, therefore, which has been put upon the language of the revocation clause, has brought the two sections into equality in this respect, and thus imparted consistency and simplicity to the scheme of the statutory restrictions upon the execution of wills. In conformity to this plan of construction, as it had been judged a sufficient compliance with the requisitions of the *fifth clause*, if the testator *acknowledged* his signing, without *actually executing it in the presence of the witnesses*, it became important so to read the *sixth section*, which requires *signing in the presence of the witnesses*, as to bring it into agreement with the preceding section. The courts, therefore, have read the concluding words of the sixth section, *will, or codicil, or any other writing, signed in the pre-*

Of the grammatical reading of the language of this section, where by it is brought into agreement with the provisions of the preceding clause.



sence of three witnesses, so as to detach the words "will or codicil" from the succeeding words, "or any other writing," coupling these last words with the words which immediately follow, viz. "signed in the presence of three witnesses."

Of the legal distinctions founded upon this construction.

Thus they have applied the requisition of a "signing in the presence of three witnesses," to the *proximum antecedens* only, "or any other writing," and again coupling the succeeding phrase "declaring the same" with the words immediately before it, have made therewith this complete sentence, "*or any other writing of the devisor, signed in the presence of three or four witnesses, declaring the same.*" At the same time the words "will or codicil" were understood to import a will or codicil executed and perfected according to the requisitions of the foregoing section<sup>c</sup>. Interpreting the language of the 6th clause, upon these principles of construction, the law which arises upon it is this; that a will or codicil, in order to revoke a former will, must be executed with the same solemnities as the original will, that is, it should be signed by the testator, or by his directions, and subscribed by three witnesses, in his presence. And if such subsequent writing, accompanied with all the formalities requisite to a perfect will of lands, under the 5th clause, make a fresh disposition of the property, inconsistent with the dispositions thereof by a former will, it is a plain revocation without any express declaration of intention to revoke. So if a writing, not duly attested according to the 5th section, contain an express declaration of intention to revoke, and furthermore, be actually signed in the presence

<sup>c</sup> Ellis v. Smith, 1 Vez. jun. 11. Hoyle v. Clarke, 218.

of three or more witnesses, such instrument is an effectual revocation, and the witnesses need not, as in the case of a substantive disposing will, under the 5th section, subscribe their names to the instrument, in the presence of the testator.

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## SECTION II.

*Methods of Revocation (1).*

THERE are two general heads under which all the smaller varieties on the subject of the revocation of wills may be included—revocations express, and revocations implied. A revocation may be said to be express, either when the testator, by a subsequent writing signed by him in the presence of three or more witnesses (2), declares a present intention (3) to re-

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(1) A man cannot make an irrevocable will, or bind himself so as to give up or take from himself this power of revocation. Swinb. p. 7. sect. 14.

(2) Though to revoke a will by an instrument of declaration according to the statute, such instrument must be signed in the presence of three witnesses, yet it has been held that it is enough if the witnesses sign, and it is not necessary that they should express in their attestation the fact of the signing by the testator in their presence, for their actual subscription is adopted only for the purpose of facilitating their recollection of the circumstance. 8 Vin. Abr. tit. Devise, 142. pl. 3. And indeed it has been said there is no absolute necessity for the witnesses to the testator's signing to subscribe at all. Vin. Abr. tit. Dev. (R) 4. pl. 3. *Townsend v. Pearce*, per Eyre and Parker J.

(3) The expression of an executory or future intention to revoke, does not operate as a revocation. Vid. infra 237.

voke, according to the construction above considered, whereby the latter part of the 6th clause is disconnected from the words ‘ will and codicil ;’ or, secondly, by a will executed with the solemnities required by the 5th section of the statute, viz. by the signature of the testator, and the subscription of three witnesses *in his presence* : which latter mode may, it should seem, be properly considered as an express revocation, because, if a man after having made a will of lands, makes another will inconsistent with the former, and gives to it the form of a substantive independent instrument, he may be said to have explicitly and expressly revoked the preceding will, since he has himself declared that the will last made is his will, at the time actually present, and by consequence that it is to take place of every different disposition of an earlier date ; or, thirdly, by cancelling, tearing, or obliterating such will by the testator himself, or by his direction or consent.

Under the 2nd general head may be classed, all those revocations which arise by the construction or inference of intention, which the law founds upon the collateral acts of a testator after making his will : and which are not within the reach of the statute of frauds.

It has been shewn, that according to the prevailing opinion, if an instrument be designed as a will, and is not made *merely* for the purpose of revoking a former will of the same lands, it will not have that effect unless it be completed as the statute directs in respect to a will of lands, although it be signed in the presence of three witnesses<sup>a</sup> ; because, being intended as a will,

<sup>a</sup> Eggleston v. Speke, Carth. 81.

and to revoke as such, it cannot revoke but *as* a will, and by virtue of that mode which in the first part of the 6th clause is pointed out. And indeed, where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking.

But although the doctrine seems now to be settled as it was laid down in the case of *Limbery v. Mason*<sup>b</sup>, viz. that if a testator designs to revoke by a new will, unless the instrument be effectual to operate *as a will*, it shall not amount to a revocation; yet the words “shall be effectual to operate as a will” must be taken, as has been before observed, with reference only to those requisites to its validity which have been made necessary to it by the 5th clause of the statute; since if properly executed and attested to pass freehold lands according to the statute, though it should be prevented from operating by the incapacity of the devisee, or any other matter *dehors*<sup>c</sup> the will, the former will is nevertheless revoked by it (4).

A will, though rendered inoperative by extrinsic circumstances, may revoke a former will.

<sup>b</sup> Com. 454.

<sup>c</sup> *Roper v. Radcliffe*, in dom. Proc. 1 Bro. P. C. 450. Vin. tit. Dev. (R. 3) pl. 2. in Notis.

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(4) 8 Vez. jun. 370. per Lord Alvanley, et vid. *Montague v. Jeffereys Moor*, 4 Roll. Abr. 615. so a will devising lands in fee to the heir at law, though void as to the purposes of a will, yet operates as a revocation if attested according to the statute, per Lord Hardwicke, in *Ellis v. Smith*, 1 Vez. jun. 17.

In the case of *Onions v. Tyrer*<sup>a</sup>, the testator by his second will disposed of the same lands to the same purposes as by the former, though to different trustees; the first will was executed and attested according to the 5th section; the second will, though subscribed by the testator and attested by three witnesses, was not subscribed by those witnesses in the presence of the testator: it was therefore invalid as a will of lands, but was executed agreeably to one of the modes of making a valid revocation prescribed by the 6th section of the statute. In that case the Chancellor observed upon the circumstance of the dispositions in both instruments being the same (5), by which it was demonstrated that the testator did not mean to revoke the dispositions of the same lands made by his first will; but his Lordship intimated that his judgment would not have been altered if the same lands had been given to *other* persons by the second will; taking, as it is presumed, the broad ground, that a will of lands is not to be revoked by a subsequent will, unless such subsequent will is effectual *as a will* under the statute; and the law seems now to be well settled, that though the dispositions of the second will be ever so inconsistent with those of the first, the first will shall stand unrevoked unless the second be signed by the testator, and also subscribed by three witnesses in his presence. The same consequence still holds though the second will contain an express revoking clause, and is also signed in the presence of three witnesses; for the revocation is then considered as

<sup>a</sup> 1 P. Wms. 342.

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(5) See the decree containing the reasons on which it was founded, stated from the register in Mr. Coxe's note to the case.

being made in subserviency to the disposing part of the will ; which being ineffectual, as not being subscribed by the witnesses in the testator's presence, the accessory must follow the fate of the principal. But where the revoking clause has not this connection with the disposing part of the will, as where the dispositions relate to other lands without affecting the subjects of the first will, or where the second will is only of personal estate, there seems to be no reason why, if it contain an express revoking clause, and be signed by the testator in the presence of three witnesses, it should not revoke an antecedent will of lands ; and such seems to have been the opinion of Lord Chancellor Cowper, in the above-mentioned case of *Onions v. Tyrer* (6).

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### SECTION III.

#### *Inconsistent Dispositions.*

CONCERNING the operation of a subsequent will of lands, with the ceremonies prescribed by the 5th section, as a revocation of a preceding will, it is material to be observed, that such effect is not produced by the subsequent will, merely as being the *last* will, unless its dispositions of the property are incapable of standing with those of the preceding will : and where

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(6) See the same doctrine and reasonings applied to the question of revocation upon the statute of 12 Car. 2. c. 24. 7-Vez. jun. 48. *ex parte Ilchester*.

there is any such inconsistency, the revocation produced thereby is confined in its extent to the subjects of the inconsistent dispositions. This seems to be well established in *Hitchins v. Bassett*<sup>\*</sup>, where the case upon the special verdict was as follows:—Sir Henry Killigrew was seised in fee of the lands in question, and on the 12th of November, 1644, made his will in writing, whereby, (amongst other hereditaments,) he devised the premises to Mrs. Jane Berkely (his near kinswoman) for life, with remainder over to Henry Killigrew (testator's natural son) in tail, and made the said Mrs. Berkely sole executrix. They further found that afterwards, in 1645, the testator made another will in writing; but what was contained in the last-mentioned will, or what was its purport and effect, the jurors were ignorant. The argument for the heir at law, and in support of the last will as a total revocation of the first, rested mainly upon the construction of the maxim—that a man could not die with two wills; which the counsel on that side interpreted to mean, that if a man, after having made a will of lands, makes and executes another will, calling it his last will and testament, and giving it the form and language of a substantive independent will, it must necessarily be a total revocation of the preceding will. It was admitted that a man might make several wills of particular subjects, but then they ought to be confined in expression to those particular subjects; for however different the subjects, yet if the subsequent will was published generally as a man's *last will and testament*, it must be held to be a revocation of the former will. It was also true that a testator might make as many codicils as he pleased, but there was a

<sup>\*</sup> 1 Show. 265. 2 Salk. 591.

wide difference between wills and codicils, a codicil being an accessory to a will and not destructive, but confirmatory thereof. It was observed also, on the same side, that where a man makes several wills expressly of different particular things, these together make but one will, though written upon different papers. But that as the jury had found that the testator had made another will, this must be taken to mean a general testament; and it must be understood to mean a different will, for if it had been a duplicate to be sure it would not be a revocation, but then it ought to be *idem* and not *aliud testamentum*. And upon the whole they concluded, that if the testator did in fact make a second will, not correspondent in omnibus with the first, and purporting to be his *last will and testament*, it was necessarily a total revocation (1).

These arguments were answered on the other side by denying the construction put upon the civil law maxim, 'that a man can die with but one will.' They said, that the true construction of that maxim was, that where two devises of the same thing were made, the last must stand, but that two wills might well stand together as to such devises or bequests as are not inconsistent. That there was no ground for presuming that the last will in this case, though a complete will, contained any thing inconsistent with the devise in the first will, under which the lessor of the plaintiff claimed. The Court (in Trinity term, 4 W. and M.) gave judgment for the plaintiff, and a writ of error being afterwards brought in Parliament, that

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(1) The same line of argument was taken and pursued by the late Mr. Serjeant Hill in arguing the case of *Goodright v. Harwood*, *Gowp.* 89.



judgment was affirmed. And since this case the point appears to have been considered as settled, that a second substantive independent will, properly executed, as a will of lands, is not, merely as such, a total revocation of a former will, but only so far as it is inconsistent with it; though it must be owned that Sir Matthew Hale, when he sat as Chief Baron in the Exchequer, seemed to be of opinion on the same case<sup>b</sup>, that such subsequent independent will, though not importing in express terms a revocation of the former, nor passing any land, would amount in construction of law to a revocation (2). That great Judge, it is true, expressed himself in favour of the first will, but then it was on the ground of there being no finding by the jury of the contents of the second will, so that it did not appear but that the second will was a *confirmation* of the first.

The rule, however, is now established, that the contents of such second will must be found, and the contents so found must appear to be inconsistent with the dispositions of the former will, to operate as a revo-

<sup>b</sup> Seymour et Ux. v. Rosworthy. Hard. 376.

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(2) In arguing the case of *Hitchins v. Bassett*, it would seem as if Serjeant Maynard meant to concede that where the second will appears to have appointed an executor, it might be considered as that sort of distinct, substantive, independent will, which must revoke a former will in toto; but I find no authority for such a concession, and I conceive that the law is at this time clearly held otherwise. It was holden (before the statute of frauds) that if a man made his will, and devised his land to J. S. and afterwards purchased the manor of D. and afterwards wrote in his will that J. D. should be his executor, this was no new publication to make the lands pass. Vin. tit. Devise (Z) S per Popham, C. J. And the principle in this respect is the same as to republication and revocation.

cation ; and that if part is inconsistent and part is consistent, the first will shall only be revoked pro tanto, and to the extent of these discordant dispositions.

The case of *Hitchins v. Bassett* received confirmation from the subsequent case of *Goodright v. Harwood*\*, which passed through three stages of adjudication. The jury found by their special verdict that J. Lacy made two wills, both duly attested so as to pass freehold estates ; and that the disposition made by the second will, which was eight years after the first, was different from the disposition in the prior will, but in what particulars was unknown to the Jurors : and the Jurors did not find that the testator cancelled the first will, or that the defendant destroyed the second. It was contended for the defendant in the writ of error, that the grounds of the decision in *Hitchins v. Bassett* were in his favour, for that that case was decided against the effect of the second will as a revocation of the first, because there was no proof whatever of any change of intention in the testator, or even that the second will did any way affect or concern the testator's lands. But that in the present case it was found that the second will was attested by three witnesses, that it did relate to lands, and indeed to the very estate in question, because the testator had no other real estate. And that as it had been expressly found that the disposition in 1756 was different from the disposition in 1748, that finding amounted to a finding of an express revocation of the first will.

But Lord Mansfield, after stating the rule that a

\* 3 Wils. 497. Cowp. 87. 7 Bro. P. C. 344.

subsequent devise of land must be inconsistent with a prior devise of the same land, or the first will would stand as a good subsisting devise, observed that it was not found that the second will was in any particular repugnant to or inconsistent with the first. Had the defendant destroyed the second will there might have been good ground to presume such inconsistency or repugnance, and the jury might have found the fact of revocation. His Lordship added, that there was no variation in substance between this case and that of *Hitchins v. Bassett*. That, properly speaking, *another* will could not exist without there being a difference, for if it were exactly the same it would be no more than a duplicate or republication of the first will. That the Jury, therefore, in finding it to be another will, said, *ex vi termini*, that it was different; but as they had not found in what that difference consisted, the Court could not presume that there was any inconsistency in the dispositions of the two wills, and by consequence they could not say that the first will was revoked.

This doctrine is in itself so rational, and so founded on authorities, that one is surprised at seeing the question renewed, and again disputed at so late a period; but even these cases did not prevent the point from coming again into discussion, with a trifling variation in the circumstances, about five years ago, in the case of *Thomas v. Evans*<sup>d</sup>; in which, a person made his will, whereby he bequeathed his personal estate to his mother, and, after several intermediate limitations, devised the ultimate remainder to T. Upon his having afterwards acquired other

<sup>d</sup> 2 East, 488.

estates, some by purchase and some by devise, and the bequest to his mother having lapsed by her death, the testator made a second will disposing by name of the property which had been so devised to him, and then added, "as to the rest of my real and personal estate I intend to dispose of it by a codicil hereafter to be made to this my will." This was determined to be no revocation of the former will. It was not necessary to suppose the words intimating the future intention to be meant to embrace the real property before devised, as the testator had acquired estates since the first will, which were not included in the second, and which might satisfy the words by which the future intention was expressed; but admitting these words to include the real property devised by the will, still it did not appear that the disposition intended to be made of it would be *inconsistent* with the former devise; and even supposing it to be intended to be inconsistent, yet an express *intention* to revoke would not operate as an actual revocation; for, as was truly observed at the bar and on the bench, what would not have been a revocation by parol before the statute would not be so since, though reduced into writing with all the formalities of the statute, and it had been decided that a bare intention to revoke, though expressed by parol, was no revocation before the statute, unless the testator declared that he did revoke his will(3).

Expressing  
intention to  
revoke no  
actual re-  
vocation.

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(3) *Cranvel v. Saunders*, Crq. Jac. 497. where it was resolved by the court, that if a man makes his will, in writing, of land, and afterwards upon communication says, that "he has made his will, but it shall not stand," or "I will alter my will," these words are not any revocation of the will, being in a future sense, and only a declaration of what he *intends* to do. Aliter, if he says I do revoke it, or in any other manner declares his purpose to revoke it in presenti. But if a testator declare his intention by

Inconsistency between the will and subsequent acts.

As a second will is no revocation of the first, any further than as it is inconsistent therewith, so neither does a testator by acting in any other manner upon the property which he has already devised by his will, revoke the will by such act beyond the extent of that necessary inference which is created by the inconsistency between the will and his subsequent conduct. Thus in an early case\* where a man having issue two sons by several venters, devised his lands to F. his eldest son, in tail male, remainder to the heirs male of W. his younger son, and for default of issue to his own right heirs; and afterwards made a lease to W. for 30 years, to begin after his the testator's death, and died: it was resolved that this lease made to W. was not a revocation of the whole devise, but quoad the term only. And the same point was agreed to on the bench and at the bar, in *Montague v. Jeffrys*†. But this doctrine is carried to its fullest extent in the case of *Lamb v. Parker*‡. There Edward Parker by his will devised to his younger son W. Parker a messuage for 99 years, if three lives therein mentioned lived so long, yielding and paying an annuity of 50*l.* to his sister, who was the plaintiff, for her life. The testator afterwards demised the same messuage to one L. for 99 years, if three lives, named in such demise, should so long live, yielding and paying 50*l.* per annum, to the testator, his heirs

\* Cro. Car. 23. *Hodgkinson v. Wood*. Ann. prim. Car. Reg.

† Vin. tit. Dev. (u).

‡ 2 Vern. 495.

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parol to revoke his will, and that upon his arriving at such a place he will execute his intention, and in his going thither he is murdered, it has been said that the intended revocation shall take place. 1 Roll. Abr. 614. 7 Vez. jun. 371.

and assigns. The question was whether this demise to L. was a revocation of the devise to W. and consequently of the annuity payable to the plaintiff.

The cause was first heard at the Rolls, and then held to be a revocation ; but upon appeal to the Lord Keeper<sup>b</sup>, the contrary was adjudged and upon the following grounds.—That by the lease to L. the term of 99 years commenced immediately in the lifetime of the testator ; whereas the term to W. was to commence from the testator's death ; and though both were determinable for three lives, and possibly L.'s three lives might happen to live the longest, yet, that a reversionary interest passed which would carry the rent reserved on L.'s lease. The ground of this species of revocation is, as is above observed, the inconsistency of the posterior Act, and the inference of intention arising from such inconsistency. Proceeding, therefore, upon this principle, a lease made subsequent to the will of the devised land, for the benefit of the same person to whom the fee had been devised, and to commence upon the decease of the testator, was in *Coke v. Bullock*<sup>1</sup>, adjudged a revocation in toto. Had it been to a stranger, it was agreed, it would only have been a revocation pro tanto (4).

Grant of a less interest than was given by the will, to the same person.

To a stranger.

<sup>b</sup> Sir Martin Wright.

<sup>1</sup> Cro. Jac. 49.

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(4) A distinction was here adverted to by Walmsley J. which is clearly not law, as the law is now settled, viz. that though in the case of a lease to a stranger after a will made, such lease, if it comprehend part only of the same lands, is only a revocation for such part ; yet if it embrace the entire lands, though it is partial only in respect to the estate, it is a *total* revocation, as extending specifically over the whole subject matter.

With a different commencement.

And it was likewise agreed that if the lease had been granted to begin presently, or futuramente in the life-time of the devisor, it would have been no revocation, for then it might have stood with the will.

Upon this distinction in respect to the time of the commencement, the case of *Baxter v. Dyer*<sup>k</sup>, determined by the present Chancellor is in accordance with the last-mentioned case of *Coke v. Bullock*. In *Baxter v. Dyer*, the testatrix, after devising lands to Sir John Dyer, and his heirs, borrowed from the devisee a sum of money, and mortgaged the devised estate to him, by a conveyance in fee, and upon the ground that mortgages are in equity considered not as conveyances of the estate, but as mere pledges thereof by way of security, this subsequent mortgage, *although it was made to the same person to whom the estate itself had been devised*, was held to be no revocation. As in *Coke v. Bullock* the lease was to begin in the life-time of the testator, and might have terminated before his death; so in this case the pledge was to take place in the testatrix's life-time, while it was hers, and at her own disposal, and the object might have been answered in her life-time. It was therefore held to be no revocation. And the Chancellor, after stating that the case of *Harkness v. Bayley*<sup>l</sup>, had been misreported, produced a note which he himself had made of it, wherein a feature of inconsistency between the will and the posterior acts of the parties appeared, by attending to which, the principle of that case might be reconciled with his decision of the case before him; for it appeared that after the mother's devise in fee to the

<sup>k</sup> 5 Ves. jun. 656.

<sup>l</sup> Prec. in Chan. 514.

daughter, the son joined the mother in a conveyance of the estate for 500 years to the daughter, with a proviso that if the mother or son should pay during the life of the mother 100*l.* a year to the daughter, and the son after the mother's death should pay 4000*l.* to his sister, then the term should cease and be void, and the son moreover covenanted with the sister to pay 4000*l.* to his sister after the mother's death; and also with the mother to pay the annual 100*l.* to his sister during the mother's life. This conveyance was clearly inconsistent with the devise, and it was also clear that the mother intended the estate to descend to the son.

The settled law therefore upon these cases is, that a will is not to be revoked but by necessary implication, so that where the subsequent will or posterior act is consistent with a prior will, or with any part of it, such prior will remains valid in part or in all according to the extent to which the dispositions of the party can be effectuated without contradiction or discordancy. But where two inconsistent wills are produced of the same date, or both without date, neither of which can be proved to be last executed, they are both necessarily, and by the common law, void for uncertainty so far as they are inconsistent, and supposing no act of the testator subsequent to the wills to have explained and reconciled them, the heir at law<sup>m</sup> is let in. Though according to the case last cited in the margin, either will is subject to be confirmed by a subsequent act or declaration of the testator. Which judgment appears to stand on a very reasonable and intelligible principle. Since a will

Where there are two inconsistent wills of the same date, they are both void for uncertainty.

<sup>m</sup> 5 Bro. P. C. 57. Phipps v. Earl of Anglesea, 7 Bac. Ab. 327.



cannot be said to be revoked by a will till the death of the testator. And the act of the testator only operates to decide which is his *last* will, and not to produce the effect of an implied or parol republication, of which, since the statute of frauds, there is authority and reason for doubting the possibility, as I shall endeavour to shew in its proper place.

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#### SECTION IV.

##### *Imperfect Acts and Instruments.*

IT is manifest that these cases of inconsistent wills turn principally upon the intention of the testator; but we must observe that a will perfected as the statute requires is not subject to be overturned by loose and conjectural inferences of an alteration of mind in the testator. The cases have reduced the doctrine to a regular system. The statute itself has limited the mode whereby a will may be expressly revoked; and one of the modes prescribed by the statute is by a subsequent will, which, we have seen, should, to produce that effect according to the force given by construction to the word "will," where it occurs in the 6th section, be perfected with the formalities required by the preceding section. But this construction of the language of the 6th section seems to have given to it no enabling efficacy, in respect to the operation of a will, since if the words "will or codicil" had not been excepted out of the restraint put

upon the power of revoking, it should seem that the statute must either have been construed not to extend to the case of a subsequent will; or to have enacted that a will once perfected, though made 20 years before the testator's death, must be taken as his last will, if remaining uncanceled, notwithstanding a subsequent will should be made within a month before the decease of the testator, with all the circumstances constituting a perfect will.

As the law now stands, it has been shewn, that a new substantive will, unless it be executed as the 5th section directs, will not revoke a former will; which rule seems to arise justly out of the principle of intention; for an intention to revoke a first will by a second can only be properly inferred from a legal, valid, and perfect disposition of the same property; which accords with the rule of the civil law, "*Tunc prius testamentum rumpitur cum posterius perfectum est* (1)." In truth, since the statute of frauds, there can be no will in contemplation of law that has not been executed with the formalities made necessary by that statute. It is a mere nullity (2), affording no ground of inconsistency from which to infer even a

No intention can be inferred from a will of lands not executed according to the statute.

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(1) See the case of the Earl of Ilchester, 7 Vez. jun. 348. that a testamentary appointment of a guardian, by virtue of the 12 Ch. 2. c. 24. is not revoked by a subsequent testamentary appointment, which is not substantively perfected by the attestation of two witnesses, according to that statute.

(2) Equally so in all courts. Thus in equity, a will of lands, unattested according to the statute, and containing a bequest of personalty to the heir, will not put him to his election, which is a striking instance to shew the absolute nullity of such a devise in the view of the courts of equity.

But other legal acts, though instrumentally inoperative, may nevertheless revoke a will.

change of intention. But in general an instrumental act of a testator, inconsistent with the dispositions of his prior will, even though such act may be rendered inoperative by the want of certain legal requisites to its validity, will effect a revocation. For though, in the case of a subsequent *will*, the courts will not take any notice of its existence as to any devise of land, if not duly executed and attested, yet in the other cases of invalid instrumental acts, they are respected as indications of intention though specifically inoperative. And, indeed, if a will devising land be executed and attested so as to have an existence as a will, though from circumstances extrinsic it be rendered void, it may still effect a revocation, as in the case before-mentioned of a will devising land in fee to the heir at law<sup>a</sup>.

And if a will be properly executed, though by circumstances extrinsic it is prevented from operating, it may nevertheless revoke a prior will.

If a testator leaves at his death a dozen wills, and only one executed and attested so as to pass real estate, such will, whatever may be its date, is properly his *last* will as to this part of his property. And as a man can have no will but his *last* will, there can be no other *will* from which any intention of the testator, inconsistent with the dispositions of his operative will, can be inferred (3); but if a testator affects to do something instrumentally, which fails from the omission of some circumstances with which it ought

<sup>a</sup> Vid. *Ellis v. Smith*, 1 Vez. jun. 17. and note (2) in the preceding page.

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(3) This is strongly put by Sir Wm. Grant in giving his opinion in the case *ex parte Ilchester*. "It is not competent for a person to express an intention, as to land, by such an instrument." 7 Vez. jun. 378.

to be accompanied, and which, if effectuated, would by its specific operation revoke a prior will, the courts will take notice of such imperfect instrument, and construe it a revocation as much as if it had been rendered effectual to its purpose. For it will not be supposed that a nugatory act was intended to be done, when that act was professedly to have immediate perfection : whereas in the case of an unexecuted will, which is made in prospect of death, and with regard to a future condition of things, it is reasonable to suppose it to be left purposely unfinished and inoperative, to be adopted or not on the approach of extremities, as the state of the testator's affairs and connexions may at that season determine his inclinations.

Upon the above-mentioned principles, the imperfect conveyances by a deed of feoffment without livery of seisin, and by a deed of bargain and sale of the freehold without such enrolment as is required by the statute in that case provided<sup>b</sup>, though specifically inoperative, are nevertheless effectual revocations. So, before the statute taking away attornment, a grant of a reversion without attornment was a revocation of an antecedent will devising the same property (4).

Imperfect  
instru-  
ments of  
convey-  
ance.

<sup>b</sup> 1 Roll. Abr. 615. Vin. Dev. (P) pl. 6. Went. Off. Ex. 22. 3 Atk. 803.

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(4) Went. Off. Ex. 22. So where a tenant to the præcipe is made towards suffering a recovery, and no other proceedings are had, a previous will is nevertheless revoked. Vid. Harmood v. Oglander, 6 Vez. jun. 199.

Power of  
appoint-  
ment ill  
executed.

Whether a deed intended to operate as an appointment of uses, but incapable of operating as a valid appointment, either from a deficiency of power in the party executing the deed, or a neglect of some ceremony made necessary to the efficacy of the appointment by the person granting the power, can be operative as a revocation, seems to be left, by the case of *Shove v. Pincke*<sup>c</sup>, in a considerable degree of uncertainty. If we look to the judgment and certificate<sup>d</sup>, it is plain that this point cannot be considered as judicially decided by this case. Lord Kenyon indeed observed, that even supposing the appointment made in that case to be an inadequate conveyance for the purpose for which it was intended, still, if it demonstrated an intention to revoke the will, it amounted in law to a revocation (5). He added, that if it were necessary to decide the point, he did not see why it might not operate as a grant of the reversion. But although the late Chief Justice seemed clearly to be of opinion, that a void appointment would have the effect of revoking a prior disposition by will of the same property, such effect was not, as far as appears by the report, at all adverted to by the other judges, and in the certificate mention was only

<sup>c</sup> 5 T. R. 124.

<sup>d</sup> 5 T. R. 310.

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(5) In the cases of feoffment without livery, and bargain and sale without enrolment, the instrument itself is complete, and there is no intrinsic defect in it, but something subsequent is wanting to its specific operation. Between these cases therefore, and that of an appointment informally executed, or without authority, there is a difference; the informality in this latter case being in the instrument itself.

made of the operation of the deed as a grant of the reversion, or as a covenant to stand seised to uses (6).

The failure of the appointment in the case of *Shove v. Pincke* arose from the defect of a power to make it, the power originally reserved having been exercised without a fresh reservation (7), but there does not appear to be any sound distinction between such a case and one wherein the failure happens by reason of an omission of any ceremony, made necessary by the person creating the power, to its valid execution. Supposing the revocation to be produced by inference of intention, it is plain that the attempt, whether the failure arise from one cause or the other, affords an equal inference of intention (8).

It has been long a settled point, that a grant made to a person incapable of taking under it, may nevertheless operate as a revocation of a will. Thus, where a man<sup>e</sup>, after having made his will in November, 1739, and thereby given all his real and personal estate to his brother, by a deed poll made in November, 1740, gave and granted to his wife all his substance which

Of grants to persons under disabilities.

• 3 Atk. 72. *Beard v. Beard.*

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(6) See the observations made upon this case by Lord Alvanley, in the important case of the Earl of Ilchester, 7 Vez. jun. 374.

(7) For this point see the leading case of *Heli v. Bond*, 1 Eq. Ca. Abr. 342.

(8) The instrument endeavoured to be set up in *Clymer v. Littler*, 3 Burr. 1244. had no definite legal character, or specific tendency, and was therefore insufficient to ground any inference of intention, besides that it laboured under a suspicion of forgery.

he then had, or thereafter might have, it was decreed that the grant was void, because the law would not permit a man to make a grant or conveyance to his wife in his life-time; neither would a court of equity suffer a wife to take the whole of a husband's estate beneficially, in his life-time, for it could not be in the nature of a provision, when it comprehended all the husband was entitled to. Yet as being an act inconsistent with and repugnant to the will, though not strictly legal, it amounted to a revocation. It produced, therefore, an intestacy as to the legacies: and though the appointment of the brother as executor remained unrevoked, yet the revocation of the legacies given to him made him a trustee in equity for the next of kin.

In the same manner a subsequent devise to a person incapable of taking under it is a revocation of a prior will; as was determined in the case of *Roper v. Radcliffe*<sup>c</sup>, in the House of Lords, where lands were given, by the second will, to a papist. And the same effect has been adjudged to wills devising an estate to the poor of the parish<sup>e</sup>, and to a corporation<sup>b</sup>.

But in these cases of invalid instruments it does not seem to be so correct a construction of their operation, to ascribe their revoking efficacy to the indication they afford of an *intention to revoke*, as to the indication they afford of an intention to do that which

<sup>c</sup> In dom. proc. 1 Bro. P. C. 450. 10 Mod. 233. 2 Abr. Eq. Ca. 771.

<sup>e</sup> *French's case*, cited in *Montague's case*, Vin. tit. Dev. (O) 4. and 10 Mod. 94.

<sup>b</sup> Vin. tit. Dev. (O) 5.

by a positive rule of law is an act of revocation (9). For unless the act if done so as to be effectual to its purpose would have the effect of revoking, an ineffectual attempt to do the act could not produce such a consequence; and, as it will appear hereafter, this effect of these acts themselves, when executed completely, cannot for the most part be satisfactorily explained on the principle of intention.

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## SECTION V.

*Acts procured to be done by Fraud or Compulsion.*

WHERE a deed is void as being covenously made, it seems clearly held to be incapable of operating as a revocation, for it is a complete nullity. And, in a court of equity, a deed obtained by fraud or by compulsion has; in a case before Lord Thurlow, been held equally inoperative against a subsisting will. His Lordship observed, that the reason against admitting such an instrument to have the effect of a revocation was strong in that court, since when application is made by the proper party it will be ordered to be delivered up, and where a deed is

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(9) Lord Hardwicke expresses this opinion in the case of *Hick v. Mors*, Amb. 216. and *Abney v. Miller*, 2 Atk. 598. and again more pointedly in *Sparrow v. Hardcastle*, of which the reader will find an accurate note in 7 T. R. 416. where his Lordship says that "these imperfect conveyances are revocations, because they import an intention of altering the condition of the estate."



ordered to be delivered up it is implicitly declared to be *no* deed (1).

The case just cited of *Hawes v. Wyatt* was first decided by the late Lord Alvanley, when Master of the Rolls, in favour of the revoking effect of the deed; and his decision was reversed, upon appeal, by the late Lord Chancellor Thurlow. It appears, however, that Lord Alvanley, when, as Lord Chief Justice of the Common Pleas, he sat with the Chancellor in the case *ex parte Ilchester*<sup>a</sup>, remained of his original opinion<sup>b</sup>. He observed, that in that case the son, who was the testator, after the conveyance to his father, went abroad; that during his life he never intimated any intention to quarrel with it; that the bill was filed to set it aside upon such an exertion of parental authority, as, that that court would not permit an instrument so framed to stand; his Lordship allowed that the deed could not operate against the heirs of the son; yet "he was of opinion it would revoke the will, for the son thought it was actually revoked, and that therefore to permit it to stand would be against principle; that though Lord Thurlow differed from him, he believed *Hick v. Mors*<sup>c</sup> was not adverted to, but that there was the authority of Lord Hardwicke that such an instrument was sufficient to revoke a will."

It does not however, in the only report of the case of *Hick v. Mors*, distinctly appear that any fraudulent

<sup>a</sup> 7 Vez. jun. 348.

<sup>b</sup> Ibid. 374.

<sup>c</sup> Ambl. 216.

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(1) See the case of *Hawes v. Wyatt*, 3 Bro. C. C. 156. It seems also to be held in this court that a deed executed by mistake is no revocation of a will, vid. 6 Vez. jun. 215. and See post tit. 'mistake.'

means were taken to induce the testator to execute the revoking instrument. The words of the reporter are, “ he was prevailed upon ;” and to be sure the facts of the case induce a suspicion of improper influence. No fraudulent arts or undue influence, however, are stated to have been used, nor are any such distinctly alluded to by Lord Hardwicke, who refers the case to that class of cases above considered, where imperfect conveyances have been held to revoke antecedent wills. Stripped of any colouring of fraud, the case was simply this : A testator covenanted by indenture to levy a fine, and in the deed specified the use of the future fine to be to H. for 1000 years, which fine was accordingly levied ; he afterwards made his will, properly attested, and devised the fee of the same premises to H. and in the year following executed a fresh covenant by indenture, reciting the first, declaring a new and different use of the fine, viz. to H. in fee ; and whether by this the will was revoked was the question. But whether the second indenture of covenant was good as to the new use of the fine may be questioned, since if a precedent indenture be made to direct the uses of an assurance, and the assurance follows, the Touchstone says, that the donor or recoverer cannot by any act of his, subsequent to such assurance, change or avoid the prior use<sup>d</sup>. The second indenture might, therefore, have been regarded as inoperative, and was probably attacked on that ground, for that seems to have been the view in which it presented itself to the court.

It is, to be sure, somewhat difficult to apprehend how a deed which is void, as being fraudulently, sur-

<sup>d</sup> Vid. Touchst. Ch. on Uses, Sect. 5.

reptitiously, or coercively obtained, and so not moving from the will, or speaking the real sense of the party, should yet revoke a previous act deliberately and formally done. Where a part only of a deed is liable to the imputation of fraud, there may be good reason for holding the other uncorrupted part a revocation of a prior testamentary disposition, as far as it is inconsistent with it. The understanding does certainly struggle against giving to an act admitted to be invalid against the person performing it, on account of the fraud or compulsion accompanying it, an operation destructive of a prior act voluntarily and considerably performed. It is true however that, in giving his opinion in the case last mentioned, Lord Hardwicke observed, that it was not like the case of a conveyance by covin, which would make it not the testator's deed *at law*; and which, his Lordship said, would be a *nullity*. There is, to be sure, a difference between the case of a deed void at law for covin to which *non est factum* may be pleaded, and that of a deed liable to be set aside by cancelling or directing a reconveyance, on account of the fraud or compulsion used in obtaining it. But it seems reasonable for a court of equity to act upon its own maxims, in analogy to the rules of law; and if that which in that court is treated as deserving of being frustrated and rescinded, on account of the turpitude of the intent and contrivance, were, nevertheless, to be considered as capable of the collateral effect of revoking a will, this, as it seems, would scarcely be reconcileable with the rule of *equitas sequitur legem*.

## SECTION VI.

· *Subsequent Conveyances.*

THE general rule that where, after making a will, the testator executes any legal conveyance of the devised property, the will is revoked, has long been established. This rule seems to rest upon technical grounds, and in regarding its whole extent we shall find that the inference of *intention* to revoke by no means affords a satisfactory foundation for it. The true reason seems to be that which Lord Hardwicke gives in *Sparrow v. Hardcastle*, “ that the estate being gone by the conveyance, the will has lost the subject of its operation.”

The alteration of the devised estate by the act of the devisor himself is a case of daily occurrence, and admits of some distinctions of great nicety. It will be proper to begin with some examples illustrative of the general rule.

If a tenant in tail makes his will and devises his land, and then by bargain and sale enrolled makes a tenant to the præcipe, against whom a common recovery is suffered to the use of the testator in fee, this is a revocation of the will<sup>a</sup>. And it was said by Lord Hardwicke to have been holden that where a man, after making his will, thinking he had only an estate tail, suffered a recovery to confirm the will, such act by the

A recovery by tenant in tail, after making his will, to his own use in fee, is a revocation. And this, though the party declares he does it to confirm his will.

<sup>a</sup> *Dister v. Dister*, 3 Lev, 108. see also to the same point, *Marwood v. Turner*, 3 P. Wms. 163. Edit. Coxe.

testator was a revocation instead of a confirmation<sup>c</sup> of the will<sup>b</sup>.

So also if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is thereby revoked<sup>c</sup>.

A feoffment by a tenant in fee, after making his will, to his own use in fee, is a revocation.

So is an effectual recovery.

And if a tenant in fee simple devises his lands, and before his death makes a feoffment of those lands to another, to the use of himself and his heirs, though this to many purposes is no alteration of the estate, for he is absolute owner as he was before, yet it is a revocation<sup>d</sup>. And where a tenant for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail, with reversion to himself in fee, made his will disposing of the reversion, and afterwards suffered a recovery and limited the use to himself in fee, this though an ineffectual recovery, was nevertheless a revocation of the will (1).

Conveyance upon a special trust, or for a particular purpose, how far a revocation.

The apparent hardship of this rule has occasioned some struggles to resist its application, where it has been most obviously opposed to the testator's intention. Thus it has been often contended that where the alteration of the estate was only for an express particular and partial purpose, not affecting the sub-

<sup>b</sup> Per Lord Hardwicke in *Sparrow v. Hardcastle*, 7 T. R. 416. note.

<sup>c</sup> *Doe and Dilnot and others v. Dilnot*, 2 N. R. 401.

<sup>d</sup> 1 Roll. Abr. 615.

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(1) 3 Wils. 6. *Darley v. Darley*, and see the remarks made upon this case by the late Lord Loughborough in *Brydges v. the Duchess of Chandos*, 2 Vez. jun. 430.

stantial and beneficial interest given by the will, the will should not be affected by it. Upon this ground, in *Sparrow v. Hardcastle*, it was endeavoured to be maintained that the conveyance being designed for a particular purpose, viz. to create a trust for the benefit of a person named in it, subject to which the trust declared was to the grantor and his heirs, it was the same as if he had left it to result, and so much of the trust as remained in him would pass by the will; but Lord Hardwicke rejected this reasoning, and declared his opinion to be, that if a man seised of a real estate devised it, and afterwards conveyed the legal estate, though only upon a special trust, yet as he granted the whole legal estate, it was a total revocation of the will.

Lord Lincoln's case (2), which was decided by Lord Somers, is a strong authority to the same point; and, as was observed in *Sparrow v. Hardcastle*, there could not be a more special case. Edward Earl of Lincoln had mortgaged the manor of S. to Wynn by a conveyance in fee, and afterwards by will, in default of issue male of his own body, devised it to Sir Francis Clinton (who was to succeed to the title) for his life, with remainder to his first and other sons in tail, with remainders over. The Earl having afterwards taken a fancy to one Mrs. Calvert, and having some notion he might marry her, (though it was proved in the cause there never was any intention in the lady or her relations respecting such marriage, nor any treaty about it)

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(2) Show. P. C. 154. 1 Eq. Ca. Abr. 411. 2 Freeman, 202. and said by Lord Hardwicke in *Sparrow v. Hardcastle*, vid. 7 T. R. 418. in Not. to be well reported in Fitz Gibbon, 241. which was in general a book of no authority.

made a lease and release of the devised premises to trustees, to the use of himself and his heirs till the said intended marriage should take effect, then as to part in trust for Mrs. Calvert and her heirs, in lieu of dower, and as to the rest in trust that the trustees should sell it, to disencumber the part limited to Mrs. Calvert, and to pay the surplus of the monies to his executors and administrators. Nothing was afterwards done towards the marriage, and sometime after the will the Earl died without making any alteration of it, leaving his honours to descend to Sir Francis Clinton, who had but a small estate, if any, and who died soon afterwards. The plaintiff, the eldest son of Sir Francis, brought his bill to have a redemption of the mortgage and a conveyance of the estate. And the defendants, who were cousins and co-heirs of the testator, brought their cross bill to be allowed to redeem and to have the estate conveyed to them.

The question was, whether the lease and release by the testator was a revocation ; and though it was plain he did not intend, in the event which happened, to revoke his will, and though by the release the estate was limited until the marriage (which it did not appear was ever seriously either in *his* contemplation or in that of the lady) to continue in the testator just as before ; the will was nevertheless held to be revoked. It is to be observed that the conversion of this estate into an equitable interest by the mortgage in fee, was the circumstance which brought this case into the court of equity, and that there was nothing in it of peculiarity which varied the effect of it in the view of that court ; so that the doctrine of *equitas sequitur legem* was entirely applicable to it ; and as by the rule of law, if this had been a legal estate the will would

have been revoked, there was no reason why a court of equity should proceed on a different rule in determining the case. The decree was confirmed in the House of Lords by a majority of two lords only.

The deeds executed in the above case were such as, had the estate been *legal*, would have passed the estate out of the testator, and wherever that is the case, the will is revoked at law (3). Upon the principle of analogy, therefore, and of that uniformity in the rules regarding property which is so important to be preserved, a court of equity was bound to follow the authorities of the common law courts in the decision of the case just cited, whatever inconvenience to the parties, or repugnancy to common feelings, might be the consequence: and in this view, that is, in reference to the consistency and generality of an artificial system of reasoning, there does not appear to be that absurdity in the case of Lord Lincoln which has been charged upon it by a great judge\*.

Where that which is done to an equitable estate, would, if the estate were legal, pass it out of one person to another, such act is a revocation in equity, upon the rule of *equitas sequitur legem*.

But by a case of great importance, which has lately been decided in K. B.<sup>f</sup> on a writ of error from the Common Pleas, whose judgment the superior court confirmed, the general rule may be considered as es-

If the estate is parted with but for a moment, and the same

\* Lord Mansfield, Doug. 722.

<sup>f</sup> 7 T. R. 399. 1 Bos. and Pull. 576. Goodtitle on dem. Holford and others v. Otway.

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(3) The uses of the intended settlement were certainly inconsistent with the will; but that made no part of the reason for holding the will to be revoked by the lease and release; it was so held solely upon the ground that the devised estate was for a moment parted with and put out of the testator, notwithstanding the old estate was taken back by the same conveyance.



use is  
taken  
back, the  
will is re-  
voked.

established to the effect following: That where a person seised of an estate, devises it, and afterwards conveys away his whole estate, though but for an instant, as merely to give a seisin to serve an use, and though he takes back the same estate to the same use as before, or such use is left to result to him so as to be descendible from him either in the paternal or maternal line as it was before, yet the conveyance operates as a total revocation of the will. And though the object of the conveyance be ever so partial or minute, and whether such object be certain or contingent, the same consequence of a total revocation flows from the mere act of parting with the estate. And from the authority of this case together with that of Lord Lincoln above cited, the conclusion is, that whether such estate be legal or only equitable, the same mode of acting upon it by passing it out of the testator, or if that cannot be strictly said of an equitable interest, by doing that with respect to it, which, if it were a legal estate, would pass it out of him but for a moment, will produce the same consequence of a total revocation.

In the case last referred to, A. being seised of certain estates in fee simple, agreed by his marriage articles to settle the same so as to secure his intended wife's jointure, and the portions of younger children, and then upon his eldest son and his heirs male. He afterwards devised the same estates, in case he should happen to die without leaving any issue of his body living at his decease, subject to any jointure he might make to trustees, for a term of 500 years, upon the trusts therein after declared, and subject thereto he devised all his real estate to B. The testator afterwards conveyed the same estates by lease and release

to releasees, to the use of himself and his heirs, till the marriage, and then to uses correspondent to the various purposes expressed in the marriage articles, and for default of issue, subject to a term for securing his wife's jointure, to himself in fee. The testator married accordingly, and died without issue. And whether his will was revoked by the settlement was the question.

Those who argued against the revocation contended that the intention of the testator was evidently not to revoke the will, and that as this intention appeared, without any resort to extrinsic evidence, from the instruments themselves, the court was bound to give it effect. That though in point of form an estate did pass out of the testator to the releasees, yet that was but a momentary effect of the conveyance, for by the limitation of the use to himself, and his heirs, till the marriage, he was still in of his old use; and the only operative part of the settlement was that which limited the uses according to the articles, in an event in which the will was to have no operation. That this was a very different case from a feoffment and refoffment, where there was a complete alienation of the land, and an entire new estate was taken back by purchase. That the doctrine must have been originally founded upon an intent to revoke, either expressed, or necessarily to be implied by law from the inconsistency of the two dispositions: but that in the case before the court, the two instruments were not only not inconsistent, but the one referred to and confirmed the other, and the settlement was only made in pursuance of the articles. That in all the cases of total revocations implied from subsequent instruments, the deviser changed the whole estate, or the dispositions

were inconsistent; but that in the case under consideration there was no inconsistency, nor was the estate changed as to that part of it on which the will was to operate; for the operation of the will was confined to the old fee-simple, which by the limitation in the settlement was returned back to the testator. There was it was said no new modelling of the estate, for the acts which took place subsequently to his will were in the testator's contemplation at the time; so that the question was broadly this,—whether where the intention was manifestly against a revocation, the instrumental mode of carrying the intention into effect should nevertheless produce the legal consequence of a revocation.

But the Court decided, that as the testator parted with the estate, notwithstanding the old use resulted to him again, still the conveyance operated as a revocation of the will, because *it drew out of the testator the subject matter upon which the will was to operate.*

Such a series of well-considered cases have concurred in establishing this particular doctrine on the subject of revocation by a subsequent conveyance, that the general rule, as laid down in the preceding pages, may now be considered as finally at rest (4). It seems a little extraordinary, indeed, that, when once it had been received in all the courts as a rule, that a conveyance by a testator of the devised *lands* to the use of himself, and his heirs for ever, was a total re-

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(4) See *Vawser v. Jeffrey*, 16 Vez. Jun. 519. By Sir W. Grant, the question is no longer open to controversy.

vocation of his will, it should afterwards be contended, that a conveyance of the fee to particular uses, and for a partial purpose, was not a revocation beyond those uses, or the exigency of that partial purpose.

The rule respecting the revocation of wills, does not in this instance rest upon the intent to revoke, but is best accounted for by considering that the testator must actually have the interest in him, which he attempts to devise, at the time of making his will: and that as the will is inchoate at the time of making it, and consummate by the death, it must have a potential existence during the interval, and by consequence the interest on which it is to operate must uninterruptedly continue, during the whole period, in the testator.

Of the necessity for the testator's being seised at the time of making his will, and continuing so to the time of his death.

Some great lawyers (5) have grounded the reason of the necessity which exists for the testator's being seised of the lands at the time of his making his will, upon the words of the statutes 32 and 34 Hen. 8. viz. "that every person *having* lands, may devise them;" later authorities have with greater correctness held, that this rule is older than the above-mentioned statutes of Henry the 8th: for according to all the precedents, the inefficacy of a will to pass lands, whereof the testator was not seised at the time of making and publishing it, applied as well to devises by custom, as to wills authorized by the statutes

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(5) See the case of *Brett v. Rigden*, Plowd. 344. where Lord Dyer grounds the reason of this rule upon the force of the word 'having,' in the stat. 32 H. 8. and see *Butler and Baker's case*, 3 Rep. 31. and *Strange*, 27.

of Henry the 8th. Thus in the great case of Bunker or Bunter *v. Cooke*<sup>1</sup>, Lord C. J. Holt observed that it appeared from the precedents, wherein it was uniformly averred that the testator was seised in fee, and that being so seised he made his will, to be absolutely necessary that the devisor of lands should be seised in fee *at the time of his making his will* (6).

Lands acquired by purchase after the will, do not pass by it.

If therefore a testator devises all his lands, and afterwards purchases other lands, and dies without making a new will or republishing his former will, such after purchased lands will not pass. Serjeant Loveless, in the case of *Brett v. Rigden*, supposed the effect to be different where the devise was of lands specifically mentioned and intended to be pur-

<sup>1</sup> Rep. temp. Holt, 246. 1 Salk, 237. Fitz Gibbon, 232.

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(6) Rastall, 274. where the devise was by force of the custom. And see the Writ *ex gravi querela*, in *Fitzherbert*, which sets out the custom; and where it is described not as a general authority to devise *terras et tenementa*, but *tenementa sua*. So that, as the custom is there set forth if they are not *sua* at the time of the devise, they are out of the custom, and the will cannot be rendered effectual by it. But it is proper in this place to apprise the student of the present liberal sense of the courts in respect to the nature and extent of the interest of which a testator must be possessed to qualify him to devise his estate. Modern decisions have extended the power of testamentary disposition to contingent and executory interests, where the person who is to take is certain, so that the same would be descendible if not devised. *Roe v. Jones*, 1 H. Bl. 30. and 3 D. T. R. 88. in which last case Lord Kenyon said that the word '*having*,' in the statute, must be understood to mean '*having an interest*,' and his Lordship distinguished between such a contingent interest and a mere possibility, or a mere expectation or hope of succession, as that of an heir from his ancestor. And see *Fearne's Cont. Rem.* 5th Ed. 463, et seq.

Contingent and executory interests are devisable.

chased, because in such case the intent was manifest (7). But this position was in the above-mentioned case of *Bunter v. Cook*, denied to be law by the Chief Justice, who added that he had looked into the case quoted in the margin, and had found nothing in it to warrant the position.

If a man devise land, and he afterwards dis-  
seised, and then die, the devise is void and cannot be made good; because the disseisin has turned the estate to a right, which is only a chose in action (8), and cannot be devised away<sup>\*</sup>; therefore, says the book, it was held a good plea against the devise, that

A right of entry not devisable.

<sup>\*</sup> Bro. Tit. Devise, pl. 15. cites 39 H. 6. 18.

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(7) In the case of *Nannock v. Horton*, 7 Vez. Jun. 399. it seemed to be the opinion of the present Chancellor, that a specific devise of personal estate, which the testator was never possessed of, might operate as a direction to the executor to purchase.

But where a real estate is *contracted* to be purchased, courts of Equity consider the estate as in the purchaser from the execution of the contract; and therefore, as a consequence of this maxim, it will be presently shewn, that a will disposing of the estate, before the contract is performed by a conveyance, is effectual to pass the interest, and is not revoked by a subsequent conveyance either to the purchaser and his heirs, or to a trustee for the purchaser and his heirs. So where personal estate is impressed with the character of real estate, by being agreed to be sold, and the money to be laid out in land to be settled, the person to take the ultimate reversion under such settlement, may devise it by his will, and the estate, though purchased *after the will*, will go in Equity according to such devise. See the case of the Attorney General *v. Vigor*, 8 Vez. Jun. 256.

(8) See the case of *Goodright v. Forrester*, 8 East, 552. The fine of a tenant for life displaces and divests the estate of the remainder man or reversioner, leaving in him only a right of entry, to be exercised either immediately for the forfeiture, or within five

But if after  
disseisin  
an entry be  
made, the  
disseisin is  
purged,  
and the ti-

the devisor did not die seized of those lands ; but the book goes on further and makes a question, whether if a man be disseised, and then make his will devising his lands, and afterwards re-enter into the lands, it be a good plea to say that the testator had nothing in the lands at the time of the devise. His Lordship then gave it as his opinion that in such a case the re-entry (9) would purge the disseisin, and that the testator would be, to all intents and purposes, by relation, in from the beginning (10). His Lordship also further observed, that a will was a disposition from the time of

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years after the natural determination of the preceding estate. And the effect of the statute 4 Hen. 7. is only to save to all the remainder men, their respective rights of entry within five years after their respective titles successively accrue, without being prejudiced, the one by the other's laches. *But such right of entry is not devisable*, though it may be released. Shep. Touchst. 325. Lit. Sect. 347. Co. Litt. 48. b. 214. a. 266. a. Perk. Sect. 86. [edit. 1642.] And see per Lord Eldon, 8 Vez. Jun. 282. Attorney General v. Vigor.

That the fine divests the remainder, see Litt. Sect. 416. and Fowes v. Salisbury, Hard. 401—2. It is also clearly held that though the remainder man is at liberty to enter presently for the forfeiture, still he has a future right of entry unaffected by that present right, which may be exercised within five years after the determination of the antecedent interest, by the death of the tenant for life. The Court thought in the case above cited, that such right of entry did not come within the description of the word *interest* in 34—35 H. 8. c. 514. and that the remainder man could not be considered as *having an interest* in the thing at the time of his devise ; for an executory interest was a very different thing from a *right of entry* for re-vesting a divested estate.

(9) But if the testator had died out of the possession it seems clear that the will could have had no effect upon it, and see 11 Mod. 128. et 1 Bos. et Pull. 602. by Eyre C. J.

(10) 38 Hen. 6. 27. and 19 Hen. 6. 17. Observe what is said of this doctrine by the present Chancellor in 8 Vez. Jun. 282.

making it, and he looked upon this to be Lord Coke's opinion in Butler and Baker's case (11).

He relates, and the lands pass by a will prior to the disseisin.

Thus too in *Arthur v. Bokenham*<sup>h</sup>, in the Common Pleas, Lord Chief Justice Trevor held that the making of a will is the foundation, and an instant incipient disposition, so that if the devisor have not the land (12)

<sup>h</sup> Rep. Temp. Holt, 750.

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(11) To prove that a devise was a present disposition to take effect in futuro Lord Holt instanced a case in Lord Bridgman's time, wherein, there having been a devise to two persons, and their heirs, and one of them dying in the testator's life-time, it was held that the survivor should take the whole. Perhaps this view of the operation of a will of lands as an *actual* disposition to take effect and become executed upon the death of the devisor, was in some measure the reason of Lord Kenyon's dictum in *Doe v. Luxton*, 6 T. R. 293. that a person entitled to an estate, *pur autre vie*, under a grant to him, and the heirs of his body, with remainders over, may cut off the remainders, and make a complete disposition of the whole estate by his *will* alone. It appears in the case of *Campbell v. Sandys*, 1 Schoales and Lefroy's Rep. 294. that this opinion of Lord Kenyon was not agreeable to the sentiments of Lord Redesdale, who observed that he could find no decision that at all warranted that opinion. His Lordship declared himself to think that on principle a will could not have that effect. But it is nevertheless to be observed that his Lordship appeared to ground his objection to the principle on a view of the nature and operation of a will a little different from that which was taken of it by Lord Holt, Lord Trevor, Lord Mansfield, and Lord Loughborough, as appears by the text. For Lord Redesdale does not seem so much to regard it as a disposition, or appointment of the lands in the nature of a conveyance to a particular devisee, as the mere designation of the special heir, against the right of the person to whom the property would otherwise devolve.

What operation a will has at the time of making it.

(12) It has been observed in a former note, that it is not meant that the possession, or an executed interest in the land, should be in the testator, it is enough if he have a present interest, though



at the time, it will not pass (13). And the interest must continue in him till his death, or it cannot receive its consummation.

Difference  
as to lands,  
and personal  
estate.

In the case of *Harwood v. Goodright*<sup>1</sup>, Lord Mansfield adopts and further illustrates the same reason

<sup>1</sup> Cowp. 90. 3 Burr. 1497.

Of the re-  
semblance  
between  
wills and  
conveyances  
to uses.

to commence in futuro, or to depend upon a contingency; but a bare expectation as that of an heir, will not suffice, as was observed by Lord Holt, in the above cited case of *Bunter v. Cooke*.

(13) Lord Trevor took notice of the resemblance between wills and conveyances to uses, and observed, that no one could raise a use in land which he had not at the time of the conveyance; as, where a father covenanted to stand seised of land which he should afterwards purchase to the use of himself for life, and afterwards to the use of his youngest son and his heirs, and then purchased the land and died, and the question was, whether the eldest or the youngest son should take, it was resolved that no use could arise to the youngest son, as the father had not the land at the time of making the conveyance; and his Lordship put the distinction well between that case and where a man covenants that he will purchase land by such a time, and then levy a fine thereof to such and such uses. When the land is purchased, and the fine levied, the uses arise upon the fine, and not on the deed, and the deed is only evidence of his intention that such uses shall arise, if no uses are declared at the time of levying the fine, for at that time he might declare other uses.

A very material distinction as to the force of the residuary clause in respect of personal and real estate, results from this doctrine of considering a will of land, as to its immediate effect, as a species of inchoate conveyance by way of appointment, viz. if a legacy of personalty lapses, the subject passes with the residue to the residuary legatee; but if a devise of real estate, which is always specific, lapses, it goes to the heir, and not to the residuary devisee. But if, *at the time of the devise*, the person intended is not in existence, the subject of the devise, if real property, will go to the residuary devisee. See *Doe on dem. Stewart v. Sheffield*, 13 East, 526. See 1 Vez. 481. 3 Vez. Jun. 25.

for the revocation of wills by a subsequent conveyance of the property. "Though as to personal estate," said his Lordship, "the law of England has adopted the rules of the Roman testament, yet a devise of *lands* in England is considered in a different light from a Roman will; for a will in the civil law was an institution of the heir; but a devise in England is an appointment of particular lands to a particular devisee, and is considered as being in the nature of a conveyance by way of appointment; upon which principle it is that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the statute of Henry 8th, which says, that 'any person having lands, &c. may devise.' For the same rule held before the statute where lands were devisable by custom. It is upon the same principle that there have been revocations determined contrary to the intent of the testator, as where he has afterwards made a feoffment or the like, because that has been construed a new appointment."

Which turns upon the distinction between the nature of a will according to the civil law, and the law of England.

These decisions, said the late Lord Chancellor Loughborough, result from fair, legal, that is, fair, systematical reasoning, and do not depend upon any captious nicety. The objections to them arise from considering the disposition, by testament, of land, in the same view as the Roman testament was considered, or wills of personal estate, which is not a just manner of considering what the law of England permits to be a disposition of land by will. It is not an indefinite disposition of all a man may be possessed of at his death, as is the case with bequests of personal property. A disposition of land by will is no more than an appointment of the person who shall take the speci-

All devises  
of land are  
specific.

fic land at the death of the person making it. It is so far testamentary that it is fluctuating, ambulatory, and does not take effect till after the death ; but it is in the nature of a conveyance, as being an appointment of the *specific* estate (14). And therefore that course of determinations, which, with some attempts to break in upon it, has been established, and fully established, by *Bunker v. Cooke*, and *Arthur v. Bockenham*, has been wisely determined ; and not determined upon the literal construction of the statute of wills, but upon the nature of the instrument<sup>k</sup>.

After-pur-  
chased  
copyholds  
do not pass  
by the an-  
tecedent  
will.

Except  
where the  
will is re-  
published  
by a sur-  
render.

The rule is the same in respect to copyholds purchased by a testator after making his will ; they will not pass by the general words of the antecedent will, unless indeed, after they are so purchased, they are surrendered to the uses already declared by the last will and testament, as was done in *Heylin v. Heylin*<sup>l</sup>, where the will was held to be republished by the words of the surrender. But in *Warde v. Warde*<sup>m</sup>, where the testator Thomas Warde, by his will, *reciting that he was seised of a copyhold estate*, (when the fact was not so,) devised all his real estate, &c. and afterwards purchased a copyhold estate, and surrendered it thus, viz. “to such uses as I by my last will *shall* appoint ;” the will was held not to operate upon this property.

<sup>k</sup> *Brydges v. Chandos*, 2 Vez. Jun. 427.

<sup>l</sup> *Cowp.* 130.

<sup>m</sup> *Ambl.* 299.

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(14) Every gift of land, even a general residuary devise is specific. See 7 Vez. 147. Ibid. 399. because a man can devise only what he has at the time of devising. See the case of *Hill v. Cock*, 1 Ves. and Beames, 175.

Still, however, if a testator is possessed of the property at the time of making his will, the surrender will be operative if made after the will. And in such a case, even if the surrender made after the will, be to such uses as the surrenderer *shall* by his last will appoint, the copyhold will nevertheless pass by the antecedent will,<sup>a</sup> if the words of such will be general enough to comprehend it. So the law stands with regard to the cases wherein the surrender is made *after* the making of the will.

It is clearly established that, in all cases, a surrender to the use of a will, to be availing, must be made while the person so surrendering has the legal property. Thus, if the surrenderee of a copyhold, before his admittance, surrenders to the use of his will, and is afterwards admitted, such surrender is of no effect, and cannot be made good by a subsequent admittance. And it matters not whether the will were before or after admittance (15).

If a man, after making his will, surrender his copyhold not to the use of his will but to new and other uses, his will is revoked, although he die before any admittance in pursuance of such surrender; and it has been held that even a covenant to surrender will

<sup>a</sup> 1 T. R. 435. *Spring and Titcher v. Biles*. N.

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(15) *Doe dem. Tofield v. Tofield*, 11 East. 246. But in favor of a surrenderee under a valid surrender the admittance has relation to the surrender, so as to make the estate pass in the same course of descent; and so as to give the same right of dower and custom, which would have attached had the admittance followed immediately upon the surrender; because these are acts of law which are helped by relation: but relation, and other fictions of law, will not make good the acts of parties otherwise invalid. 3 Rep. 29. a.

produce the same effect<sup>o</sup>. But if after having surrendered to the use of his will, a copyholder in fee surrenders to new and particular uses, with reversion to himself in fee, it has been held that he may devise the reversion, without any fresh surrender to the use of his will<sup>p</sup>.

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## SECTION VII.

### *Of subsequent dealings with the Estate in Equity.*

It has already been shewn that equity preserves an analogy in respect to the effect given to a testator's acts, as operating to revoke his will, and that therefore any disposition or disturbance of the estate, which at law would have produced a revocation, will be followed by the same consequence where the subject is equitable. But if, after a will disposing of an equitable estate, the testator takes a conveyance to himself and his heirs, of the legal estate, this is no revocation of the will (1). For nothing here passes out of the testator, and what he has subsequently acquired is, at least in consideration of equity, nothing new, in as much as in the view of a court of equity, he had the complete

If a man having an equitable estate makes his will and afterwards takes a conveyance of the legal estate to himself and his heirs, it is no revocation.

<sup>o</sup> Vawser v. Jeffrey, 16 Vez. Jun. 519.

<sup>p</sup> Throutout d. Gower, v. Cunningham, 2 Blackst. 1046.

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(1) By Lord Hardwicke, in *Parsons v. Freeman*, 3 Atk. 741. and by Lord Loughborough in *Brydges v. Chandos*, 2 Vez. Jun. 429. and see the case cited by Lord Loughborough from Roll. Abr. 616. pl. 3. *Cestui que use* before the statute of uses, devises; afterwards the feoffees make a feoffment of the land to the use of the devisor; and after the statute the devisor dies, the land shall pass by the devise. And see *Watts v. Fullarton*, Dougl. 691.

estate before, and therefore that judicature does not regard the property as at all altered.

But if this case be reversed, and the facts be supposed to be, that a man seised of a legal estate makes his will, and then conveys the estate to another in trust for himself, and his heirs, the will is clearly revoked in law, because the subject of the devise is parted with, and the estate which is subsequently acquired in equity, is a totally new estate, and therefore not included in the will<sup>a</sup>.

But if, having the legal estate, he devises it, and then passes it to trustees for himself and his heirs, the devise is revoked.

In *Parsons v. Freeman*<sup>b</sup>, it was agreed by the marriage articles, that the wife's lands, of which she was seised in tail, should be conveyed to the intended husband in fee; they married; the husband made his will, and devised these lands: and afterwards the husband and wife suffered a recovery of the same lands to such uses, and for such estates, as they should jointly appoint; and, in default of appointment, to the use of the husband and his heirs. She died without appointing, and it was decided by Lord Hardwicke, that the will was revoked; his Lordship at the same time admitting, that, if the husband had only taken the legal estate by the recovery, to execute it into the equitable estate, it would have been no revocation; but in the case as it stood, *new uses* were created, and though no appointment was made, yet, the fee was by the recovery taken differently qualified<sup>c</sup>.

If, where the legal estate is called in after a will made, any new use is engrafted upon it, the will is revoked.

So where a man having bound himself by articles, makes his will, devising so much as the articles were not intended to operate upon, and

<sup>a</sup> Ibid.

<sup>b</sup> 3 Atk. 74 1.

<sup>c</sup> Et vid. *Tickner v. Tickner*, cited 3 Atk. 741. 1 Wils. 308.

then conveys his legal estate upon trusts, by way of settlement in execution of the articles. Upon the principle of the decision in the decisive case of *Goodtitle v. Otway*, above cited, such a conveyance in trust as last-mentioned, would be a complete revocation of the will. The case of *Williams v. Owen*<sup>d</sup>, which was decided at the Rolls in 1795, a few years before *Goodtitle v. Holford*, certainly proceeded upon a contrary doctrine: but that case has been considered as open to great doubt, since the decision of the case of *Goodtitle v. Holford*.

Comments  
on the  
cases of  
*Williams v.*  
*Owen*, and  
*Brydges v.*  
*Duchess of*  
*Chandos*.

The case of *Williams v. Owen* was shortly this: a man being seised in fee, by articles prior to marriage, covenanted to convey his estate to trustees, to the use of himself for life, remainder in trust to secure an annuity to his wife in bar of dower; remainder to trustees for a term to raise portions; remainder to the sons and daughters successively in tail; remainder to his own right heirs. He afterwards made his will, and devised the reversion in fee in the event of his dying without issue; and afterwards and before marriage, executed a settlement in pursuance of the articles, by which he conveyed the estates to trustees, and their heirs, to the uses and upon the trusts of the articles. It was holden that this settlement did not revoke the will, being nothing more than a mere legal execution of the articles.

The Master of the Rolls compared this case, in principle, to that wherein a testator, having devised an equitable estate, takes a conveyance of the legal estate from his trustee, to himself and his heirs, or to

the uses of the will. He admitted that after the articles the devisor remained seised of the legal estate, and passed it out of himself by the conveyance; but he said that by the articles he had reduced himself to a remainder man in fee in equity; that having this ultimate trust in fee he devised it, and then the subsequent act with respect to this fee was no more than clothing it with the legal estate. The objection to this reasoning, however is, that it is not strictly according to the fact, but seems more like misapprehension than could be expected from so accurate a Judge, for there seems to be no propriety in considering the testator as having converted himself by the articles into an equitable remainder man. He clearly retained the whole fee simple in law, and the ultimate reversion, being a part of such fee, was comprised in the will, and afterwards conveyed out of the devisor, which brings the case clearly within the range of the doctrine above discussed.

In alluding to the case of *Brydges v. the Duchess of Chandos*, his Honour observed, that it was impossible not to see that the judgment in that case which gave to the settlement the operation of a revocation was founded upon the variation of the settlement from the articles, and he took it to have been clearly the Chancellor's opinion, that if the settlement had fully followed the articles in the case before him, there would have been no revocation.

It is evident, however, that if that was the inclination of the Chancellor's mind, he was furnishing reasons and authorities against his own opinion, by the long preface to his very learned and able decree in that cause, wherein he has elaborately expounded the



doctrine of virtual revocations by the alienation of the subject of the devise upon the principle and nature of wills, which indispensably require a continuation of the same interest from the making of the will to the time of the testator's death.

The facts of the case of *Brydges.v. the Duchess of Chandos*\*, were shortly these: the Duke of Chandos, on the 20th of June, 1777, by articles previous to his marriage, covenanted that he would, within six months after his marriage, convey lands in such manner that he should be seised in fee, and his wife entitled to dower if she survived him; and also that he would, within 12 months after the marriage, settle the said estates subject to the dower of the Duchess to the use of himself for life, to trustees to preserve contingent remainders, remainder after the deaths of the Duke and Duchess to trustees for a term, to raise portions for younger children; remainder to the first and other sons of the marriage in tail male; remainder to his own right heirs. The Duke also covenanted, that, in case the dower should not be equivalent to 2000*l.* per annum, his representatives should make good the deficiency. The marriage took effect, and on the 9th of January, 1780, the Duke by his will, after confirming the articles, devised all the real estates which he had by the articles agreed to settle, in case he should die without issue male, or in case of failure of issue male in his wife's life-time, to his wife for life; remainder to his daughters as tenants in common in tail, with further limitations. The Duke afterwards executed a settlement, by which, reciting the marriage articles, he conveyed the fee to

releasers, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term, to raise 2000*l.* per annum, for the Duchess, for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the Duke and his heirs.

Upon a view of this case, as above shortly stated, there is an obvious variation in the settlement from the terms both of the articles and the will, and this variation of the interests was much dwelt upon by the Court, to meet the argument of the settlement's being attracted to the articles, so as, by the fiction of relation, to date back, in contemplation of equity, from a time anterior to the will. But from the whole course of reasoning and illustration adopted by the Lord Chancellor, and particularly from what he says in making the application of his general propositions to the facts of the case, viz. that "he should be apt to say that this was a conveyance of the whole fee; that the object required it; that it was a disposition that would revoke the will at law; and that *that* Court ought not to determine differently from the rule of law as he had before stated it," it manifestly appears what would have been his opinion upon the case if there had not been in it the other ingredient of a substantial variance between the will and the settlement.

There seems, therefore, to have been good ground for the concession of the counsel in the case of *Cave v. Holford*, in Chancery\*; that it is impossible to re-

concile *Williams v. Owen* with *Brydges v. the Duchess of Chandos*. The difference, indeed, between a case circumstanced like that of *Williams v. Owen* (2), and that which the propriety of the decree, according to the professed principle of it, required it to resemble, may be expressed by the contrary propositions of *parting* with the estate and *bringing home* the estate.

In *Watts and others v. Fullarton*<sup>1</sup>, the testator having previously articed to purchase an estate, became in equity the owner of the estate, from the time of the articles, and having afterwards settled the purchased property by his will, his subsequently taking a conveyance of the estate to a trustee for himself and his heirs, was on solid equitable grounds held to be no revocation; and the trustee would, of course, be seised of the legal estate upon trusts corresponding to the directions of the will.

Lord Bathurst, who decided that case, was said by Lord Mansfield to have relied much on the general proposition laid down by Lord Hardwicke, in *Parsons v. Freeman*<sup>2</sup>, that "where a man has an equitable

<sup>1</sup> Stated Doug. 691. 2 Vez. Jun. 602.

<sup>2</sup> 3 Atk. 741. 749.

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(2) The opinion of the Master of the Rolls, in *Williams v. Owen*, supposes the articles, and the marriage which followed, to have turned all the estates into equitable estates, so that when the conveyance was afterwards made of the legal estate, it was no more than clothing the equitable fee, which had been devised, with the legal estate.

See the reasoning of the Master of the Rolls, in *Harmood v. Oglander*, 6 Vez. Jun. 218. in explanation of the principle of his opinion in *Williams v. Owen*.

interest in fee in an estate, and devises it, and afterwards directs a conveyance of the legal estate to the same uses, this is no revocation." It is evident, however, that this case of *Watts v. Fullarton*, exceeded the bounds of Lord Hardwicke's proposition, which supposed the legal estate to be afterwards conveyed upon the same trusts as directed by the will; and which would be the case of a simple change of the trustee; whereas, in the case last mentioned, the will had settled the estate in a strict form, and the subsequent conveyance from the vendor was for the benefit of the purchaser and his heirs.

The act which succeeded the will in the case of *Watts v. Fullarton*, was in effect nothing more than a completion of the contract; and upon the strength of what has been laid down by Lord Hardwicke, in *Parsons v. Freeman*<sup>b</sup>, and confirmed by later authorities, we are warranted in concluding, that if the testator in this case of *Watts v. Fullarton*, had taken the conveyance to himself and his heirs, instead of taking it to a trustee for himself and his heirs, such conveyance would have been no revocation in equity, and the effect thereof would have been to have made the heir a trustee for the persons taking under the will.

That the change of trustees is no revocation of a will was held also in the case of *Bark v. Zouch*<sup>c</sup>, where A. having made his will, and devised that his feoffees in trust should make a lease to C. and D. for 80 years, at a certain rent, payable to his executors, afterwards procured them to join with him in making a feoffment of the devised hereditaments to new

<sup>b</sup> 3 Atk. 741.<sup>c</sup> 1 Ch. Rep. 23.

trustees and their heirs, to the use of himself, until he limited new uses thereof, which he never did. It was held that the feoffment was no revocation of his will. And again, in the case of Doe, lessee of Sir William Gibbons *v.* Pott<sup>t</sup>, where a mortgagor devised the mortgaged lands, and afterwards paid off the mortgage, and caused a conveyance to be made by the mortgagee of the legal estate to a trustee, in trust for himself and his heirs, such a transfer of the legal estate was held not to operate as a revocation of the will.

But between the two last-mentioned cases there is this observable difference, that in *Bark v. Zouch*, the owner of the equitable estate, after devising it, *joined* in the conveyance from the old to the new trustee; whereas in *Doe v. Pott*, it does not appear from the report of the case that the mortgagor was a conveying party in the instrument, whereby the legal estate was transferred to the new trustee. It is probable he was not, having already, and before his will, conveyed his equity of redemption to the trustees of his marriage settlement. It seems, however, that the decision of *Bark v. Zouch* is agreeable to sound equitable principles; for the reason for a will's not being revoked by a mere change of trustees, viz. because no estate in equity passes out of, or is acted upon by, the testator, seems equally to hold where the owner of the equitable estate joins with the old trustee in conveying to the new, since such act is as inoperative in equity as at law, except for the purpose of being directory of the intended transfer.

<sup>t</sup> Doug. 710. and vid. per Lord Eldon, 11 Ves. Jun. 554.

In a case where the first of two wills devised land to trustees upon certain trusts, and the second devised the same lands, together with another piece of land, to the old trustees, with others, but upon the same trusts, the second will was held to be no revocation of the first<sup>1</sup>, and as it should seem, upon the clearest equitable grounds. For in such a case the estate devised by the first will did not *pass out* of the testator till his death, and there was no *inconsistency* in the devises. The peculiar facts of that case made it important to decide whether the first will was revoked; for though the second will included all the purposes of the first, yet the statute of mortmain having passed between the making of the two wills, unless the estate could pass by the first it could not pass at all, as being for a charitable object. It is true, the second will devised the legal estate to three new trustees, in addition to the old, but still in respect to the two former trustees, and in respect to the trusts themselves, there was no disagreement; and we may remember that the rule with its three branches is this—that a subsequent devise, to revoke a subsisting devise of land, must be inconsistent with such former devise; that the apparent inconsistency must be irreconcilable; and that the first of two wills is, upon the ground of inconsistency, revoked only to the extent of the inconsistency.

Equity holds a very steady course in respect to these revocations of wills by subsequent alienations, applying the rule of law to those interests which are looked upon as the estate itself in equitable consideration, and to equitable purposes, in such manner as to keep the decisions of law and equity, in

Revocation in equity by articles to sell for valuable consideration;

<sup>1</sup> 1 Vez. 178. 186. Willett v. Sandford.

this respect, the same in principle. Thus, it being the maxim of equity to treat an estate which has been articted to be conveyed by the owner to a purchaser for valuable consideration, from the moment the articles are executed, as vested in the purchaser, and therefore as capable of passing by his will, if properly executed<sup>m</sup>, and the subsequent conveyance of the legal interest as having no effect upon the will, being only the medium of carrying the estate home; in pursuance of the same maxim, that Court considers a devise of land to be revoked by subsequent articles to convey or settle the devised premises for valuable consideration; for, if the estate, after the articles are executed, is to be regarded, as vested in the purchaser, it ought to be regarded as passing by the same act out of the vendor or settler, and therefore by a plain consequence of this rule of equity, a testator by a subsequent covenant for valuable consideration to sell or settle the devised estate, must be held to have revoked such prior testamentary disposition.

Thus, where<sup>n</sup> a testator devised to his wife six houses in bar of dower, and the rest of his real estate to his two daughters and their heirs, in moieties, and afterwards in consideration of the marriage of his eldest daughter, by marriage articles covenanted to settle one moiety of his real estate to the use of himself for life, remainder to the husband and wife for their lives, remainder to the younger children of the marriage in tail general, remainder to the husband in fee; Lord Chancellor King held that al-

<sup>m</sup> See the case of *Broome v. Monck*, 10 Vez. jun. 604. that an equitable title acquired after a general devise passes by republication.

<sup>n</sup> *Sir Barnham Rider v. Sir Charles Wager, et al.* 2 P. Wms. 328.

though it was but a covenant, and therefore at law no revocation of the will, yet that the same being for valuable consideration, was in equity tantamount to a conveyance, and consequently a revocation of the will, as to the six houses devised to the wife. So that the husband was entitled to one clear moiety of the rents of the real estate, from the death of the testator. The same doctrine was again laid down by the same Chancellor in a subsequent case\*, and has since been confirmed by the learned Lord who at present holds that high station<sup>†</sup>, as well as by the eminent person who at present presides at the Rolls<sup>‡</sup>.

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### SECTION VIII.

#### *The Doctrine of Relation.*

SOMETHING has already been said on the doctrine of relation, as it applies to this subject. It seems to call for a particular notice, as there is some apparent confusion in the cases upon wills which have turned upon it—a confusion which seems in some measure to have arisen from a neglect to advert to the different notions conveyed by the word, ‘relation’ in our law (1).

\* 2 P. Wms. 624. *Cotter v. Layer*.

† 5 Vez. Jun. 654. ‡ *Vawser v. Jeffrey*, 16 Vez. Jun. 519.

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(1) It would be too much to undertake to introduce in this place a general explanation of the law on the subject; for being of great difficulty in itself it is rendered more so by the want of an uniform principle in the decisions upon it. A short view of it, however, as far as it is connected with the revocation of wills, is called for by the present enquiry.



Difference as to the effect of disseisin and subsequent entry, where the disseisin is before and where it is after the will.

In the case of the disseisin<sup>a</sup> before adverted to, the relation is of a very forcible kind. By his re-entry the disseisee is circumstanced exactly as if he had never been disseised, for the new possession unites so immediately with the former possession as to destroy the tortious estate, as well as all the legal effects of the tortious act. But it may, perhaps, be reasonably doubted, (2) upon the strong words of statute of wills, and the established maxim of the law, which make the actual *having* either the estate itself, or an interest amounting to a jus in re, essential to the operation of a devise of land, whether, if *after* disseisin a devise be made of the land by the disseisee, and afterwards an entry be made by him, the relation be such as to make the will operate to carry the land. For it has been said that relation shall never operate to make an act good which was void for defect of power (3). In

<sup>a</sup> Vid. *supra*, Sect. 6.

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(2) This same distinction I have since found adverted to by the present Lord Chancellor, in the case of the Attorney General *v.* Vigor, 8 Vez. jun. 282.

(3) See Vent. 304. and see also 3 Rep. 29. Butler and Baker's case, that relation will, in many cases, help acts in law, but will never help acts of the parties, that is to say, make void acts of the parties good : and therefore if a man enfeoff an infant or femme covert, and then devise the land, and afterwards the infant or the husband dissent, such dissent without question, shall have relation between the parties *ab initio*, to this intent that the infant or husband shall not be charged in damages, or receive any prejudice, but shall never make a void grant, gift, or devise, good by relation. But the attentive reader will perceive that there is a relation of a stricter kind, (and which can hardly be called a mere fiction of law,) which may have the effect of giving validity and efficacy to an intermediate act, incapable, at the time of its being performed, of any present operation.

the case which was in the contemplation of Lord Holt, the devisor had the estate when he devised ; the disseisin only broke the continuance of the ownership ; but in the case last supposed, the devisor would have had no estate, but a right of entry only when he made the devise.

In the foregoing case of disseisin the law seems to help and favour the relation on account of the intervening title's being tortious. For as this species of relation is a fiction, and all fictions of law are governed by the equity of the law (4), the odiousness of

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(4) In the case of the Attorney General *v.* Vigor, 8 Vez. jun. 279. the reader will find an attempt made to reason by analogy from this case of disseisin and entry by the disseisee after will, to a case where after his will the testator exchanged the devised lands for others, and an eviction happened after the testator's death, so as to raise a title to recover back the exchanged property. Those who argued against the revocation contended, that as the attempted exchange had completely failed, the whole transaction was avoided, and the old estate was remitted, precisely as if it had never been out of the devisor : that there was an implied condition, upon the presumed title of the land, that if either party was evicted, there was a total end of the exchange, and the other party might enter : that it must be considered as only a parting with the possession without transferring any title, and that as the old estate continued in the devisor, the devise was no more revoked than it would have been by the grant of a lease. But Lord Eldon, after admitting the perfect propriety of Lord Holt's opinion, as to the effect of the re-entry after disseisin by the disseisee in his life-time, adverted to a striking difference between the cases of disseisin and exchange, viz. that the disseisin was not the act of the party but a wrong and violence done to him : neither did it escape his Lordship that even in the case of the disseisin, if the disseisee neglected to enter, his mere right to enter would not pass by the will, and that the case put by Lord Holt supposed the entry to be actually made ; whereas in the case before him, as it stood upon the facts, the eviction did not

the wrong (5), induces such favour to the relation of the recovered right, that the intermediate act is wholly obliterated and out of the remembrance of the law.

Of the effect of a re-entry upon condition broken.

Whether a re-entry for a condition broken by an alienee, or performed by an alienor, restores the old estate so as to remove all consequences of the alienation, seems open to doubt. It does not stand quite upon the grounds of the case, just above put, of the disseisin, there being no wrongful act to aid the construction of relation. In the first volume of Roll's

Whether if a testator aliens upon condition after making his will, and then enters for the condition broken, the will is revoked?

Abridgment<sup>b</sup> it is said, that if a man devise and then alien upon condition, and afterwards perform the condition, and enter and die, it seems the devise is revoked; though in a case mentioned in the reports<sup>c</sup> of the same Judge, it is said, arguendo and without contradiction, that entry for a condition broken makes a man by relation in as of his first estate, just as if the possession had never been out of him. And whether the entry be for a condition broken, or on a condition performed, the principle must be the same. All agree that after entry, upon condition performed or broken, the party is in as of his old estate; but the doubt is whether it be not too strong to say that *he is in as if the estate had never been out of him.*

This effect can only be given to the entry by sup-

<sup>b</sup> 617 Pl. 3.

<sup>c</sup> Nicholas v. Simmonds, 2 Roll. Rep. 469.

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happen till after the death of the party, so that the lands conveyed in exchange continued through the life of the party, and at the time the will became operative, under the effect of that conveyance.

(5) Relation will not defeat collateral acts which are lawful, especially if they concern strangers, 13 Rep. 21.

posing it to work by the same forcible sort of relation which has been observed to take place in the case of the disseisin. And indeed it would seem to follow as of course, that if the entry could operate as a *continuance* as well as a *restoration* of the title, the will of the party would be made good by such entry. But it appears to be very questionable whether such a case of reunion of title is strictly a case of relation at all.

If any forfeiture is incurred or privilege lost by the alienation, such forfeiture or loss of privilege continues, notwithstanding the alienor's subsequent entry for breach of condition. Thus if a tenant for life makes a feoffment and re-enters for a breach, he shall be tenant for life again, but still subject to the forfeiture. So if tenant by homage auncestrel had made a feoffment on condition, the uninterrupted continuance of the privity in the blood of the tenant was dissolved by the alienation, and after a re-entry for a breach, the tenant would not have holden by homage auncestrel again. For the same reason also if a lord of a manor makes a common law conveyance of an escheated copyhold (which is an enfranchisement) upon condition, and re-enters for breach of the condition, no relation takes place to save the privilege, but the continuance of the custom is broken, and the estate returns without the right of re-granting it as copyhold<sup>a</sup>. These cases shew that though the re-entry for a condition broken restores the estate, it restores the estate affected and modified by the act of alienation; and that the law takes notice that it has been once out of the party; so that the weight of reasoning and analogy seems to be on the side of the above cited

<sup>a</sup> Co. Litt. Estates upon Condition.

dictum from Roll's Abridgment; since the inference from these examples is, that the return or restoration of the old estate upon an act of alienation does not imply an unbroken continuance of title. From the same reasoning we may deduce a confirmation of the propriety of the decision in the case of *Goodtitle v. Otway*. For if we hold to the cases which say, that if a man makes a feoffment in fee to a stranger to the use of himself in fee, there though the old estate is said to return, yet it is not the identical estate, since it comes back first in the shape of the use, and then the statute carries the legal estate to the use which is in a manner a new purchase<sup>e</sup>; then the cases upon re-entry for breach of condition are much stronger, to shew the legal consequences of the estate's being once out of the party, for in such cases the identical estate does certainly return. At the same time it must be confessed, that if we adopt the opinion that in the case of a feoffment to the use of the feoffor and his heirs, the old use was never drawn out of the party; the above cases upon re-entry upon condition performed or broken, seem to be somewhat weaker than the doctrine which maintains a will to be revoked by an act which never disturbed the real interest of the devisor, but left that use (which before the statute of uses was the proper equitable subject of devise) still remaining unchanged in the party conveying.

Of relation  
in its strict  
sense.

I come now to speak of that stricter sort of relation before alluded to, and which, in its true notion, is that principle by which an act of law is made to date back, in legal consideration, to the time of some precedent act, so as to be regarded as the completion of that of which such first act was the proper beginning, and

forming in conjunction with it one integral and consummate transaction of law. Thus it has been properly said, that where<sup>f</sup> the commencement, progression, and consummation of a thing are necessary to go together, all of them are to be respected. But the thing is to be considered as receiving its perfection from the first. So where divers acts concurrent go to constitute a conveyance estate or other thing, the original act shall be preferred, and to this the other acts shall have relation, as was said by Berkley and Jones, justices in the case of *Harper v. the Bailiffs of Derby*<sup>g</sup>. But Lord Hobart has explained this sort of relation with most strength in the case of *Needler v. the Bishop of Winchester*<sup>h</sup>, on the question as to the relation of the enrolment of a deed to the king, where that profound Judge observed, “that there are certain relations which cannot properly be called fictions of law, but are real acts, compounded of some simples, which make not a complete or entire act till they come together, and then they make one perfect act working by their nature *ab initio*, even as others do that are in their nature single; but those things are properly fictions of law, that have no real essence in their own body, but are so acknowledged and accepted in law for some special purpose.” Of this sort of compounded act the case of a grant to the king, not perfected by enrolment, but which when the enrolment takes place has its effect not from or by the enrolment, but from and by the first act, is said by Lord Hobart to be an example<sup>i</sup>; of which kind also is a feoffment within view and a subsequent entry, which entry *dates back* in effect to the time of the feoffment<sup>k</sup>.

<sup>f</sup> 3 Bulst. 11.<sup>g</sup> Jones, 428.<sup>h</sup> Hob. 272.<sup>i</sup> Plowd. Com. 31.<sup>k</sup> Vid. *Parsons v. Pierce*, Pollexfen, 45.

The same principle governed the opinion of the bench, as to the second point, in Shelley's case (6), which turned upon the retrospect of the execution to the judgment in the recovery, so as to make the act consummate by relation, in the life-time of the party dying between the judgment and the execution. And there it was said that the execution of every thing which is executory always respects the original act, and all make but one act or record, although performed at different times, for *causa et origo est materia negotii*. Upon the same principle stands the case of dower mentioned in Bingham's case (7), that if a husband levies a fine with pro-

(6) 1 Rep. 106, b. Where, in the vigorous dialect of those times, the recovery is said to be the mother which conceived the use, and the fountain out of which it rose.

(7) 2 Rep. 93, b. Dyer, 72, b. 224. And note that the statute 32 H. 8. which gives an entry to the wife and her heirs, against the alienation of the husband, helps the discontinuance but not the bar. See Co. Litt. 326, a. To understand this point, respecting the operation of the fine as a bar of dower, it is necessary the reader should know, that where a person has neither a right in presenti or in futuro, at the time of the fine levied, he is out of the purview of the statute; for as the reporter, in his note to the case of *Stowell v. Lord Zouch*, Plowd. 373. expresses it, the purview is against those who have right at the time of the fine levied, or have future right afterwards upon cause arising before, to which future right wrong was done before the fine, or by the fine. Upon the foundation of this proposition, the learned reporter denies the case in the text, contending that in the case of dower the title wholly accrued after the fine, viz. by the death of the husband, for he was of opinion that until the death of the husband no title was consummate, nor wrong done by the cognusee in detaining the land from the wife; and that therefore the fine did not reach the title, in as much as it accrued upon cause wholly after the fine, the two first points, marriage and seisin, being of no moment without the third.

clamations, and dies, and five years pass after his death, the wife is barred of her dower, for though at the time of the fine levied her title was not consummate, yet the law respects the first and original causes, viz. marriage and seisin.

Thus also although a surrenderee of a copyhold has no estate in the premises surrendered until his admission, yet on being admitted he is in by relation to the surrender, from the date whereof his admission operates. Should the surrenderor die before such admission of the surrenderee, he dies indeed seised in law of the premises, and though his widow might in strictness claim her free bench, yet on the admission of the surrenderee that estate is defeated (8), together with all the mesne acts of the surrenderor<sup>1</sup>. And as all the mesne acts of the surrenderor would be defeated by this relation, so by force of the same relation all the mesne acts of the surrenderee would be confirmed; and accordingly the surrenderee, after admittance, in declaring in ejectment might lay the demise immediately from the surrender<sup>m</sup>, and recover

Of the relation, in respect to copyholds, of the admittance to the surrender.

<sup>1</sup> *Benson v. Scott*, Carthew, 275. *Vaughan v. Atkins*, 5 Burr. 2764. 2787.

<sup>m</sup> 1 T. R. 600. *Holdfast and Woollams v. Clapham*.

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But this opinion of Plowden is contradicted by all the books. See the *English Plowden*, 373.

(8) Sir W. Jones, 451. *Parker v. Bleake*. It is to be observed that the relation defeats the widow's bench, because it prevents the husband dying seised, which (except where it is otherwise by special or local custom, for which see *Robinson on Gavelkind*, p. 172.) is necessary to ground the title to dower; and therefore an alienation by the husband to take effect in his life-time, bars the claim of the widow. *Cro. Jac.* 126. *Lashmer v. Avery*.



mesne profits from that time". On this ground it was, that in a case where a copyholder surrendered to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs, and afterwards surrendered to the use of his will, and made and executed his will accordingly, and after such surrender and will made, was admitted upon the former surrender, the will was held not to be revoked, because the admittance related to the time of the first surrender, and the whole transaction might be considered as one and the same\*. And Lord Mansfield added, that this was the principal reason which the court went upon in *Selwyn v. Selwyn*<sup>†</sup>, for, said his Lordship, after stating some other reasons of the judgment, the great and manly ground upon which the court went in that case was that the deed, recovery, and all the whole transaction was to be considered as one conveyance.

The substance of the case of *Selwyn v. Selwyn* was this: A father, tenant for life, and son, remainder man in tail, executed a bargain and sale, which was duly enrolled, whereby they conveyed the entailed lands to a third person, to make him a tenant to the præcipe for suffering a recovery, the uses of which recovery were declared to be to the father for life, remainder to the son in fee, and after the writ of entry was sued out, but before it was returned, the son made a will, whereby he devised the same lands to the father in fee, and died after the recovery was completed without revoking or altering his will. And the following question

\* 2 Wils. 15. *Roe d. Jefferey v. Hicks.*

† 1 Blackst. Rep. 605. *Roe d. Norden v. Griffiths.*

‡ 2 Burr. 1135.

was proposed by the Lord Chancellor to the Court of King's Bench, "Whether the lands of which this recovery was suffered passed by the will?" The court gave no reasons for their opinion, agreeably to the usage upon cases referred out of chancery; but, according to Sir James Burrow, they repeatedly expressed their approbation of the case of *Ferrers and Curson v. Fermor* and others, and therefore it is likely, says the reporter, (who was confirmed by Lord Mansfield afterwards, as appears by the case above-mentioned of *Norden v. Griffiths*) that they considered the whole as one conveyance, which must relate to the date of the bargain and sale, which was perfected, made absolute and delivered from objections by the subsequent ceremonies (9).

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(9) A writer of great knowledge in his branch of the profession, in page 149 of his treatise on conveyancing, has observed, that until seisin no uses can arise under the recovery, and that consequently until there is seisin in the demandant as the means of supplying the seisin to uses, the person claiming under the uses has no legal estate which will admit of an alienation by deed, but he has an inchoate interest which will allow of his devising his interest by will. The true ground, continues this writer, of *Selwyn v. Selwyn*, is, that even before the recovery was suffered, the testator had in him a title to a future use, which gave him a power of testamentary alienation, and his will operated upon this use in its fiduciary state, and also on the estate itself, when the use was executed into the estate. He goes on to say that another ground of that case, and the ground to which it is more generally ascribed is, that the recovery and the recovery deed formed one assurance.

Possibly, however, this writer, as he makes no mention, might not have been aware, of the above cited case of *Norden v. Griffiths*, wherein Lord Mansfield, who presided on the bench in *Selwyn v. Selwyn*, declares, most emphatically, that the true ground upon which the decision in that case went was that which this gentleman seems not to admit to have had much share in producing it,

The case in *Cro. Jac.*<sup>1</sup>. referred to and approved in *Selwyn v. Selwyn*, was in effect as follows : A lessor covenanted with his lessee for years, that a bargain and sale should be made, and a fine levied to the lessee and his heirs, to the use of him and his heirs, to the intent that a common recovery might be suffered against the conusee, with voucher of the lessor, who should vouch over the common vouchee, to the use of A. B. and his heirs ; and after the bargain and sale, and fine and recovery were perfected, A. B. brought an action against the lessee for rent arrear, and the question was whether the lease was extinguished and destroyed by the deed fine and recovery ? It was agreed, that if a fine or feoffment be made to a lessee for years, to the use of a stranger, it would not extinguish the term (10), for it was saved by the statute of uses, which executed the use, and saved all rights ; estates, and interests ; but as in this case the bargain and sale was made, and the fine levied, to the lessee, to the intent that a recovery might be suf-

<sup>1</sup> 643.

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viz. that the indentures, recovery, and the whole transaction was to be considered as one conveyance. Indeed the other supposed ground seems very refined and fanciful, and stands but ill with the subsequent cases on the doctrine of revocation.

(10) If at the common law, before the statute of uses, a termor took a conveyance of the premises in lease to him, to himself and his heirs, to the use of another, his own term was saved to him in equity. And observe that the legislature did not, by the statute of 27 H. 8. design to prejudice any rights or estates, but to preserve them, so that the operation of the statute would be at once to execute the use as to the reversionary interest, and to prevent the merger of the intermediate estate. See the case in *Cro. Jac.* 643.

ferred, whereby certainly the term was drowned and extinguished for a time, until the recovery was suffered, (since during that interval, no use being raised, the saving in the statute of uses did not apply to the case,) whether the lease should be revived and recontinued by the recovery which raised the use, and so let in the statute, was the doubt? And the court resolved that it should be revived, for the bargain and sale, and fine and recovery, were all but one assurance, and the recovery being suffered, which was grounded upon the covenant, was quasi a conveyance to the use ab initio (11).

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(11) Of a similar opinion, in respect to the relation in these compound conveyances to the first fundamental act, so as to carry back the title to the date of the leading instrument, were the two Judges, Croke and Montague, in the case of *Haverhill v. Hare*, Cro. Jac. 510. The case as to this point was as follows: William Parker, being seised in fee of lands, on the 31st October, 8 Jac. I. by indenture enrolled, granted a rent of 20*l.* per annum to Isaac Warden, payable at Michaelmas and the Annunciation, with clause of distress; and by the same indenture covenanted to levy a fine of the same lands to the uses following, viz. that if it should happen that the said yearly rent of 20*l.* should be in arrear, and no sufficient distress upon the premises, or if any rescous, poundbreach, or replevin should be made, that then it should be lawful for the said Warden to re-enter and enjoy, till satisfied out of the rents. On the 12th June, 9 Jac. I. Warden sold and conveyed the rent to William Fisher, the lessor of the plaintiff, with all penalties, forfeitures, &c.

On the 19th October, 11 Jac. the rent due at Michaelmas was in arrear, and was demanded by Fisher, but not paid. In the Trinity Term succeeding a fine was levied to Fisher, to the uses specified in the first indenture of covenant above-mentioned. Fisher afterwards distrained for the half-year's rent of 10*l.* due at Michaelmas, 11 Jac. and the tenant of the land replevied; whereupon Fisher entered under the uses of the fine. And one of the

## SECTION IX.

*Mortgages, &c.*

I SHALL now pass to the consideration of mortgages, securities for money, and conveyances to pay debts, which Lord Hardwicke has enumerated as the

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questions in this case was, whether, as this rent of 10*l.* was due, and demanded before the fine levied, (at which time no use could arise upon the non-payment) and then *after* the fine levied a distress was taken for the rent due *before* the fine was levied, and afterwards replevin was sued thereupon, a title of entry accrued by way of use to William Fisher? and on this point the Justices were divided, for Haughton and Dodderidge held, that as the rent was due before the fine levied, the use upon the fine could not be extended to the rent formerly in arrear. But Croke and Montague held, that the fine levied and the first indenture were but *one assurance*, for the execution of all things executory respects the original act, and shall have relation thereto, and all make but one act, although done at several times. See Vin. tit. Dev. (O) pl. 3. Jones 7, pl. 7. Mitton v. Lutwich, and Salk. 341. Lloyd v. Lord Say and Sele; see also S. C. in 3 P. Wms. 170. and the observation in the note to the first edition. It appears, however, from what has been decided and held in courts both of law and equity, in the great case of Goodtitle v. Otway, that where articles are made providing for a reversionary interest in the covenantor, and then the covenantor by will disposes of such reversionary interest, and then makes a settlement whereby his whole legal estate is conveyed to uses correspondent to the articles, the will is not saved by any relation of the settlement to the articles in analogy to the above-mentioned cases of assurances by fines and recoveries.

excepted cases out of the general rules of revocations<sup>a</sup>.

Mortgages in fee are differently regarded in the courts of common law and those of equity. At law they are total revocations, but in equitable consideration they are only revocations *pro tanto* (1). It is not on the ground of the particularity of purpose that a mortgage in fee is in equity held to be only a revocation *pro tanto*, though the distinction between the practice of courts of equity and law have been often incautiously put upon that ground; but the true reason arises out of the distinct considerations under which mortgages pass in courts of law and courts of equity.

Different consideration of mortgages in courts of law and equity.

A court of law can only look to the legal operation of the deed, whereby the testator, by conveying out of himself his legal estate, of necessity must be held to revoke a previous disposition by will of the same estate; but in equity the transaction has another aspect, and is only regarded as a security for the debt; the de-

<sup>a</sup> 3 Atk. 805.

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(1) And if the mortgage be by deed and fine, it is nevertheless said to be a revocation only *pro tanto*, in equity, 2 P. Wms. 334. per Lord Chancellor King. But according to Viner tit. devise (P) pl. 10. it was held by Lord Cowper, 6 Ann. that if a man devises lands, and afterwards mortgages the same for years, and then levies a fine *sur cognizance de droit come ceo*, and not a fine *sur concessit*, this will be a revocation; but that a fine *sur concessit* would have revoked only *pro tanto*. It is a critical question whether the principle upon which courts of equity consider mortgages as only revocations *pro tanto* does not reject this distinction.

In equity, conveyances by way of mortgage, or for payment of debts generally, are only revocations to the extent of the charge.

visor remains complete owner, as before, of the estate, subject only to the security, which in the contemplation of equity is nothing but a chattel. And, upon the same principle, if, after a devise, the testator makes a conveyance of the whole fee, upon trust to sell and pay debts, the interest of the testator (2) is only affected to the extent of that incumbrance. To that extent the will is revoked; but the equitable estate in the subject of the devise remains unaltered, except in so far as it is become charged with such debts; and therefore if, after such deed of conveyance, the legal estate in the remaining part of the property, when the object of payment of debts has been satisfied by the disposition of part, is taken back by the testator, by a reconveyance to himself and his heirs, his will is unrevoked in equity<sup>b</sup>.

The late Lord Alvanley (3), when sitting as the Master of the Rolls in the case of *Harmood v. Oglander*, states the criterion for ascertaining when equity will interfere with the law in respect to the revocation of wills by subsequent conveyances, and

<sup>b</sup> Vid. *Harmood v. Oglander*, 6 Vez. Jun. 221.

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(2) It is to be observed, however, that if A. devises lands to his executors to be sold for the payment of his debts, and then conveys it to trustees for the payment of debts, the devise is revoked. 2 Ch. Ca. 116.

Lord Alvanley's defence of Williams v. Owen.

(3) It would be a sort of injustice to that learned Judge to omit this opportunity of introducing to the reader the ingenious vindication which, in the course of his judgment in this case, he makes of his decision and doctrine in the case of *Williams v. Owen*. "If, says he, instead of articles, the testator had, before the marriage,

to what extent, with great precision, and in a manner which shews that the doctrine is not grounded on the particularity of the object of the deed. He lays it down as a primary rule of law, that "any alteration of the estate, or a new estate taken, is at law a revocation, whether for a partial or a general purpose; equity never controuls the law upon revocation, except either where the beneficial interest, being distinct from the legal estate, is devised, and the devisor if he afterwards takes the legal estate, takes it without any modification or alteration; or where, having the complete legal and beneficial estate at the date of the will, he divests himself of the legal estate, but remains owner of the equitable interest, as in the case of a mortgage, or a conveyance for the payment of debts."

In the above case of *Harmood v. Oglander* the object of the intended recovery was a mortgage; it was therefore for a partial purpose; but that alone

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conveyed to a trustee, in trust for himself till the marriage, then for himself for life, remainder to the issue in tail, remainder to himself in fee, and then made the will, and then had called upon the trustee to convey, and he had conveyed, it is admitted that *that* would have been a complete revocation in law; but as clearly it would not have been a revocation in equity, and the heir must have conveyed to the uses of the will. In principle that does not differ from the case of *Williams v. Owen*. There the devisor was bound by the articles, and he might have been compelled to convey accordingly. Then it is strange to say, that if a conveyance were taken from a trustee it would be no revocation; but if, according to his obligation, he himself conveyed to the same uses, it would be a revocation. No one can deny that articles are in equity equal to a conveyance. No one can deny that he remained a trustee to the use of the articles, and must have conveyed accordingly." But see *supra*, page 274.



could not save it; and although, if it had been a simple conveyance of the fee by way of mortgage, it would have been only a revocation *pro tanto*; yet the mode of effecting this intention being by recovery, with double voucher, which in equity as well as law proceeds upon a previous conveyance of the whole estate from the owner to the tenant to the præcipe, to be recovered out of him by the demandant, from whom a new estate is to be taken, the will was held to be clearly revoked; and this although the recovery was not, in fact, proceeded in further than the conveyance to the tenant to the præcipe.

The true ground on which mortgages in fee are considered in Equity as only revocations *pro tanto*.

In *Sparrow v. Hardcastle*, as that case is reported in a note to *Goodtitle v. Otway*, in the reports of Messrs. Dornford and East\*, Lord Hardwicke intimates the true ground on which mortgages in fee are considered in Equity as only revocations *pro tanto* of a will. "The principal ground," says his Lordship, "on which they put this case is, that this grant was intended only for a particular purpose, and that when that purpose was answered the estate was not intended to be altered, but to remain as before; and this was compared to a mortgage. The reason why mortgages are taken to be out of the general rule is this. It does not depend on the general ground insisted on at the bar of being conveyances for a particular purpose, (4) but on the foot of being securities only. Whether the mortgage be in fee or for years

\* Vid. 7 T. R. 417.

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(4) In *Harmood v. Oglander*, Lord Eldon gives full confirmation to this opinion. That case was decided for the entire revocation both at law and equity, on the ground of there being uses de-

only, is all one in this Court; they are alike considered as chattel interests. A mortgage in fee goes to the executors, (for whom the heir is only a trustee), supports no dower, and has no one property of a real estate."

So that upon an accurate consideration of this point, we shall perceive nothing in it which breaks in upon the maxim of *equitas sequitur legem*. The truth being that when an estate is charged or mortgaged, a Court of Equity does not regard the estate as any way passed, modified, altered, or affected (5). The same doctrine is carried to a trust for payment of debts; so that the resulting beneficial interest

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clared upon the recovery beyond the mere purpose of the mortgage. Indeed wherever a recovery is necessary, the estate must undergo an alteration thereby: and therefore if a tenant in tail makes a mortgage, and for that purpose suffers a recovery, and declares the ulterior use to himself in fee, the estate is altered, and the will is clearly revoked. See 8 Vez. Jun. 106.

(5) An equity of redemption imitates more closely the legal estate than a mere trust. See the notice taken of this distinction in *Burgess v. Wheate*, 1 Blackst. 145. and see Sir Matthew Hale's definition of a mortgage. Hard. 469. Pawlet's case. So Lord Nottingham, (M. S.) says, an equity of redemption charges the land, and is not a trust. Blackst. 145. A mortgage is not a mere trust, but a *title* in equity. In a word, the equity of redemption is in equity the fee simple of the land, and by consequence, after foreclosure, the mortgagee is considered as acquiring a *new* estate. But if it be a mortgage for a term of years only, and the equity is foreclosed, or released, after the will, the new interest may pass under the general words of the residuary clause; for the equity which is so gained by the release or foreclosure is the interest in a chattel only, and therefore may well pass by the prospective operation of the residuary devise, if sufficiently comprehensive in expression.

Difference between an Equity of redemption and a mere trust.

upon a trust to pay debts is not in the view of a court of equity a suspended or springing interest to arise upon a future event, but a present vested estate subject to such trust as a mere charge (6).

The principle has received a still further extension in a late case\* in which it has been held that the devise of real estate is not revoked by the bankruptcy of the testator. The question could, of course, only regard the surplus, which in that case remained after payment of all the bankrupt debts. And it was contended in behalf of those who claimed under the will that a bankruptcy was only in effect a conveyance for divesting all the property of the bankrupt merely to make it subservient to the object of paying his debts; so that there was no sound distinction between the case of a mortgage, or a general conveyance for payment of debts (which has the effect of a charge only with a resulting trust as to the surplus) and a convey-

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\* *Charman v. Charman*, 14 Vez. Jun. 580.

(6) There is no difference between a charge for a particular debt, and a general charge for debts. Though the whole is directed by the subsequent conveyance to be sold to pay debts, yet the surplus is to be paid to the devisee of the estate by the previous will. 2 Vern. 295. *Ogle v. Cook*, 1 Wils. 310. where Lord Hardwicke expressed his approbation of that decision, and see *Lady Vernon v. Jones*, 2 Vern. 241. But where a man directs the surplus to be paid to his executors and administrators, this seems to be a converting of the land into personalty, and so the subject of the devise is specifically destroyed. See 2 Vez. Jun. 436. Where a man after making his will conveys in trust for himself, the will is revoked in law and equity; though there is a case in which a deed of trust made by a melancholic person by way of caution has been held no revocation. *Coles v. Hancock*, 2 Ch. Rep. 210.

ance by operation of law for the same purposes. The court in its decision of the case dropped something in reference to the partial and particular purpose of the conveyance under the bankruptcy, but this seemed only to have been adverted to for the sake of pointing out the distinction between bankruptcy and disseisin.

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SECTION X.

*Partition.*

**PARTITIONS** stand upon a different foundation from mortgages or conveyances in trust to pay debts; but they are not more referrible than mortgages to any supposed distinction between conveyances for general and particular purposes. There could not be a more particular purpose than that in *Luther v. Kidby*<sup>a</sup>, and had this been a sufficient ground, the Chancellor would not have sent it to a court of law.

In neither of the cases of *Luther v. Kidby*, or *Risley v. Lady Baltinglass*<sup>b</sup>, is any thing said of a special purpose. Whenever the question concerning revocation by partition, has come under con-

<sup>a</sup> 3 P. Wms. 170. Note to the first edition. 8 Vin. 148. pl. 30.

<sup>b</sup> Sir Thomas Raymond, 240.

Established law that partition is no revocation.

consideration, it has been taken for established law, and has been said to stand on peculiar grounds, but those grounds have generally been left unexplained. And though Mr. Justice Buller, in the case of *Goodtitle v. Otway*<sup>c</sup>, observed that cases upon partitions generally happen in equity, he was compelled to admit that long previous to *Luther v. Kidby*, it was established at law that a partition was not a revocation of a will.

It is not very easy to reconcile the cases upon partition to the principles which have usually governed in the cases of revocation (1). It may be a reason

<sup>c</sup> 2 H. Blackst. 525.

Difference between tenants in common, and joint-tenants, as to the effect of partition.

(1) Tenants in common after partition take the same estate as before, though in another mode, *Vid. post* 346. But the partition among joint-tenants has the effect of altering the estates of the parties. In the case therefore of joint-tenants, the points of enquiry are the reverse of those which come into question in the case of tenants in common. Where a tenant in common having devised his estate makes a partition, the question it has given rise to has been, whether the devise was revoked by the partition. But where one of two joint-tenants has made a will devising his moiety, and a partition has afterwards taken place, the question has been whether the will has had effect given to it by the partition; the affirmative of which question could only be maintained on the notion that at the time of making his will, the testator, as such joint-tenant, had an interest in its nature devisable, but which was prevented from passing as such by being intercepted and supplanted by the *jus accrescendi*. But it has been determined that a joint-tenant is under an original incapacity to devise his moiety, being not comprehended within the statute of wills, which being an enabling statute, whatever is not included in it remains as at common law. *Swift v. Roberts*, 3 Burr. 1491.

for this doctrine, that the party is compellable by process of law to make partition ; and that an act thus imposed upon a party, has upon such ground of compulsion been held not to disturb his previous dispositions by will. And it is remarked by Lord Hale, in his commentary on the writ de partitione facienda (2), that the writ is brought to ascertain the possession, and the legal estate is not affected. The courts seem to have been careful, however, not to extend this allowance to any case where any thing is done beyond the dry purpose of partition ; for where in *Tickner v. Tickner*, cited in *Parsons v. Freeman*<sup>a</sup>, the deed limited the moiety, in the first place, to such uses as the testator should appoint, and in default of appointment to him in fee, Lord Chief Justice Lee, who had signed the certificate in *Luther v. Kidby*, held that the slight variation by the introduction of the power made it a revocation.

Where there is any other purpose declared besides the mere purpose of the partition, the will is revoked.

Mr. Justice Heath declared it to have been his opinion \* that “ the cases of *Luther v. Kidby*, and *Tickner v. Tickner*, were difficult to be reconciled with some of the other cases, and with each other. That the only difference between them was the power of appointment in the latter ; and, that though the execution of the power would be a revocation of the will, yet that the mere reservation of the power ought not to have that effect.” Buller, Justice, in the same case said, that the case of partition was a case *sui generis*. If the partition was by writ against

<sup>a</sup> 3 Atk. 742.

\* 3 Vez. Jun. 656.

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(2) Fitz. Abr. 142. and see a note of this case produced by Lord Loughborough, in 2 Vez. Jun. 432.

the wish of the testator it was no revocation, and it was but one step more to hold that the same thing by deed or fine should not have a different effect. The authority of *Luther v. Kidby*, as far as it is an authority, only goes to this, thatt here is no difference in effect whether the partition by fine be in pursuance of a covenant, or of a writ of partition, but the court did not mean to lay down a rule applicable to any other case. Taking the whole together, it seems, said that learned Judge, as if it was thought that there was a difference between a fine for a partition and any other purpose. He agreed with Heath J. that there was no material difference between *Luther v. Kidby*, and *Tickner v. Tickner*; for notwithstanding the power of appointment, the fee vested in the testator, and then the deed and fine were the sole ground of revocation in that case, and if so, it was in direct contradiction to *Luther v. Kidby*; and the report of *Parsons v. Freeman*, in *Ambler*, shews it was so considered, for Lord Hardwicke approved of *Tickner v. Tickner*, and said it was the same case as that before him (3)."

We find no earlier notice of this question as to the revocation of a will by a deed of partition, than that of *Lestrange v. Temple*, in *Siderfin*<sup>†</sup>, where

† P. 90.

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(3) But as that case is reported in *Atkins*, a better Reporter, Lord H.'s observation was that *Tickner v. Tickner*, came very near the present; it was not merely to effectuate a partition, but for another purpose, and *therefore* Lord C. J. Loe held it amounted to a revocation, and I am, said his Lordship, for the *same* reason, of opinion that the recovery here is also a revocation.

a quære is made whether, if one holding lands in common with another makes his will and devises all his lands, and afterwards makes a partition by agreement, and not by writ, the partition is a revocation. Soon afterwards, in the case of *Temple v. Webb*<sup>c</sup>, a tenant in common of a manor, devised all his interest in the manor, and then a partition was made, and a fine levied to corroborate the partition; and the question being, whether this partition and fine were a revocation or not, they were adjudged to be no revocation. And the Judges are said by the Reporter to have entertained the same opinion, (though no judgment was given) in *Risley v. Balinglass*<sup>h</sup>.

*Luther v. Kidby*<sup>i</sup> was thus: A. and B. were tenants in common of lands in fee simple. A. by his will dated 25th January, 1719, devised his moiety in fee; afterwards A. and B. made partition by deed dated 16 May, 1722, and fine, declaring the use as to one moiety in severalty to A. in fee, and as to the other moiety in severalty to B. in fee. This case was sent by Lord Chancellor King to the Judges of the King's Bench, for their opinion, whether the will was revoked, and it appears by the Register's book, that that court composed of Lord Raymond, C. J. Page, Probyn, and Lee, justices, certified,—“that they were all of opinion that the will of the said A. was not revoked by the deed, and fine levied in pursuance thereof; and that the said A.'s share of the lands contained in the deed, and the fine levied

<sup>c</sup> *Freem. Rep.* 542. pl. 735. *Vin. tit. dev.* (R. 6) pl. 6. in the Notes.

<sup>h</sup> *Sir Thomas Raym.* 240. in the Exchequer.

<sup>i</sup> *Vin. tit. dev.* (R. 6.) pl. 30, 1730. and see 3 P. Wms. 169. Note by the Reporter.



thereon, did pass by the will of the said A." with which opinion the Lord Chancellor concurred.

About 20 years afterwards, Lord Chief Justice Lee, who had signed the certificate as puisne Judge, in *Luther v. Kidby* or *Kirby*, decided the case of *Tickner v. Tickner*, which was as follows<sup>k</sup>: Robert Tickner, seised in fee of the estate in question, which was of Gavelkind, died intestate, and left two sons, Henry and Robert, who entered, on his death, and became seised in Gavelkind. Robert being possessed of an undivided moiety made his will, and devised it to his wife Elizabeth Tickner, and her heirs. After this will of Robert, by a deed of partition between Robert and Henry Tickner, and by a fine, all the Gavelkind lands were divided, and Robert's share was allotted to him to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee. A verdict was found in ejectment, subject to the opinion of Lord Chief Justice Lee, who, after mature deliberation, held the transaction to be a revocation of the will.

Great opinions on the propriety of the decisions in *Luther v. Kidby*, and *Tickner v. Tickner*.

The doctrine in respect to the question of revocation by partition is founded upon the foregoing cases; but it has been shewn that a part of the Bench in the discussion of the case of *Goodtitle v. Otway*, doubted of the principle on which *Luther v. Kidby* was determined; and considered that case, and the case of *Tickner v. Tickner*, though the Judge who concurred in the one decided the other, as irreconcilable. Great Lawyers, however, have thought very differently upon this subject. To

<sup>k</sup> Cited in *Parsons v. Freeman*, 3 Atk. 742.

Lord Chancellor Loughborough both these cases appeared to be rightly and consistently determined, and this opinion was expressed by him in a judgment which displayed, in language and argument the most graceful and luminous, his deep acquaintance with the whole subject and its principles<sup>1</sup>. Speaking of *Luther v. Kidby*, his Lordship observed, "It was sent to law; and the court of law being of opinion, *and wisely*, that it was not a revocation, this court determined in conformity to the law, following the law." But where the object of the deed went further than a mere partition by conveying the estate to such uses as the party should appoint, Lord Chief Justice Lee held it an alteration in the estate, and that it would not pass by the will at law, and Lord Hardwicke has given his sanction to that authority, and would not determine against the rule of law.

Opinion  
of Lord  
Lough-  
borough.

The present Chancellor in a case determined by him in 1802, has recognised the law upon these two cases of *Luther v. Kidby*, and *Tickner v. Tickner*, to stand thus: "That mere partition, whether by compulsion or agreement, is not a revocation of a will; but the slightest addition, as a power of appointment prior to the limitation of the uses, is sufficient"<sup>m</sup>. And again in another case decided by him in the ensuing year, his Lordship put the seal of his high authority upon this much agitated question. "The case of partition," said his Lordship, "is a sort of special case. Each party can compel the other to make partition; the estate is the same, enjoyed afterwards in a different quality, and in another mode: and upon a

Lord  
Eldon's  
opinion.

<sup>1</sup> Vid. 1 *Brydges v. the Duchess of Chandos*, 2 Vez. 429.

<sup>m</sup> 7 Vez. Jun. 564.

principle compounded a little of those two reasons, that that which can be compelled, if done voluntarily, and provided nothing more is done than mere partition, shall not revoke the will. I say, provided nothing more is done, for it has been long established, that if the object is to do any thing beyond the partition, it will be a revocation: it is tried by the fact whether the acts demonstrate any intention to go beyond the mere partition: and notwithstanding the expressions of the Judges in some of the reports, that *Luther v. Kidby*, and *Tickner v. Tickner*, cannot stand together, they have stood together a considerable time, and in my opinion are perfectly reconcilable \*."

But a will may be so confined in terms as to be of necessity revoked by partition.

One distinction upon this subject it is very necessary to recollect:—That if the manner in which the partition is made destroys the interest of the testator in the thing given, so that at his death there is nothing in him to answer to the description of the specific subject of the devise, it must follow, notwithstanding the rule that the mere partition is not a revocation, that the devise is revoked, since it cannot operate, the thing being withdrawn upon which it was to operate. Thus if A. seised as a tenant in common, or co-parcener, of a moiety of two estates, the one in Berkshire, and the other in Lincolnshire, devises his *Berkshire estate in terms*, and then by a partition between himself and his co-proprietor B. the Berkshire estate is allotted wholly to B., and the Lincolnshire estate to A., the devise is of necessity revoked \*.

\* 8 Vez. Jun. 281.

\* See the case of *Knollys v. Alcock*, 7 Vez. Jun. 558.

## SECTION XI.

*Leases.*

THE subject of revocation includes some questions of great nicety in respect to devises of leases and specific chattels. Whether a fresh lease taken by renewal passes under a prior disposition by will of the original lease was a point in the case of *Marwood v. Turner*<sup>a</sup>, before Lord Chancellor King. The argument against the revocation supported itself on the following reasons:—That the testator had expressed in his will his ardent desire that his trustees, to whom the lease was devised, should use their utmost endeavours to continue the lease in the male line, as long as there were any to inherit the title. That as to the surrender of the old lease, that being only to take a better and more beneficial estate, was intended for the advantage of the devisee, to give him a larger and more extensive interest, and to increase the bounty that was before designed him. Now to make such an intended act of kindness a destruction of the will, would be to invert, in the highest degree, the meaning of the testator. That the renewal of the lease was only ingrafting upon the old stock, that which was of the same nature with the old stock, and was a continuation of the same estate with some little addition to it. That this was demonstrated by the common case, where a trustee of a lease for lives, when all the lives but one are expired, renews for the old life and two new ones, and then

Whether a renewed lease passes under a prior disposition by will of the original lease.

<sup>a</sup> 3 P. Wms. 168.

the old life dies ; here though, but for the renewal, the lease would have been quite at an end, yet the renewed lease is held subject to the same trusts as the old lease was, and is considered as a continuation of the same estate. That it was very usual to make provision for younger children out of these leases, which commonly require a renewal every seven years, or upon the dropping of a life. And if one, so seised or possessed, having made his will, and thereby provided for a younger child or children, should soon afterwards renew his lease, but forget to republish his will, (which might often happen), such a construction would create the greatest inconveniences. That no judgment at law, nor decree in equity, had been cited, whereby it had been determined, that the bare renewal of a lease was a revocation of a will. And it was further urged, that if this renewal of the lease was a revocation in *law*, yet it would not be so in equity, but the renewed lease would be subject to a trust for the devisee.

*In general, a renewal is a revocation, whether it be of a chattel or a freehold lease.*

But it was held and decreed by the Lord Chancellor, that the renewal of the lease for lives in that case was a revocation of the will as to this particular, for that by the surrender of the old lease the testator had put all out of him, and had divested himself of the whole interest, so that there being nothing left for the devise to work upon, the will must fall, and the new purchase being of a *freehold descendible* could not pass by a will made before that purchase. And his Lordship expressed surprise that this case which must have often happened, had not been before determined.

We should observe that the true reason upon which

this point of revocation turns, is, that the specific thing which was the subject of devise is gone, so that the words of the devise can have no operation. And this reason applies as much to a chattel lease renewed after a will containing a bequest of it, as to a freehold lease, for every specific bequest must upon the same principle be considered as revoked or rather adeemed by the subsequent disposition, alienation, or destruction of the particular subject in the testator's life-time.

There is, however, a material difference as to this point between freehold and chattel property. If a lease held upon lives be devised and afterwards renewed by the testator, the devise is revoked, although the will should contain words of future import applicable to that interest; for the renewal being a new purchase (1) of a freehold it cannot pass by an antecedent will, as has been fully explained in a former part of this work. Whereas if a testator possessed of a *chattel* renewable lease devises all his *estate, right and interest*, which he shall have to come in the particular lands so in lease to him at the time of his death, or includes it in a general devise of his residuary property, a lease taken by him after making his will, by way of renewal, will pass by it <sup>b</sup>.

A material difference in this respect between freehold and chattel leases.

<sup>b</sup> See the case of *Abney v. Miller*, 2 Atk. 593.

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(1) A woman purchased a church lease to her and her heirs, for three lives, and died, leaving an infant daughter; two of the lives dropped; the infant's guardian renewed the lease, and then the infant died without issue; the freehold lease was held to be a new acquisition, and of consequence as descendible to the heirs, *ex parte paterna*. *Mason v. Day*, Prec. in Ch. 319.

In the case of *Carte v. Carte*<sup>c</sup>, Lord Hardwicke appears to rest much upon a distinction between *trusts* and *legal estates* in respect to the operation of a will upon these renewed chattel leases, and he alludes to *Abney v. Miller*, as being the case of a legal estate, whereas in *Carte v. Carte*, the testator was only cestui que trust. But in *Abney v. Miller*, his Lordship had said that the rule of revocations must be the same in law and in equity; and the same observation has been made by almost every succeeding Chancellor. In truth, it would be difficult to point out a single case, which, when the principles and analogies of equity, and the views, which, from the genius of its particular jurisdiction, it takes of the instrumentary transactions concerning property, are properly attended to, is inconsistent with the rule of *equitas sequitur legem*.

The decision of *Carte v. Carte*, did not seem to require any other distinction to support it than that which arises out of the different import of the words used in the will. The testator in that case bequeathed to his eldest son Thomas, after giving some legacies to other persons, all the rest of his goods, chattels and estate whatsoever, whether real or personal, in possession and reversion, and then by a supplemental clause directed that he should have the disposal of his lease and receive to himself all the profits and advantages accruing from it; which words upon the principles of reasoning adopted by his Lordship, seemed amply sufficient to pass the beneficial interest then subsisting, together with the benefit of all subsequent renewals, and would equally have comprehended and

passed the subsisting lease, and future renewals, had the interest been legal instead of equitable. For his Lordship in the last-mentioned case observed, "there is no question but that a man by will may bequeath a term of years which he has not in him at that time, but which comes to him afterwards. Therefore all these cases of revocations of legacies, or bequests of terms of years, arise from the short penning of the will; and if in the case of *Abney v. Miller*, the testator had said, I will give all the interest I have in the lease, there is no doubt but that the renewed lease would have passed (2)."

It appears from a careful comparison of the cases, that for the renewal of these chattel leases to be a revocation, the devise of them must be specific, and that whether revocation or not is a question to be determined by that short criterion (3). The case of *Stirling v. Lydiard*<sup>d</sup> amounts in effect to settle it upon this basis. There the testator gave all and singular

Whether the renewal of a chattel lease is a revocation depends upon whether the devise is specific or general.

<sup>d</sup> 3 Atk. 199.

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(2) In *Abney v. Miller*, however, his Lordship intimating the proper words for conveying these after-taken leases, suggests words of a future import as necessary in addition to the words, *all my estate*, &c. the words he prescribes are, *all my estate, right, and interest, which I shall have to come in this lease*. And in *Rudstone v. Anderson*, 2 Vez. 418. the Master of the Rolls, Sir J. Strange, would not allow there was any real distinction between the import of the words *all my tithes* and *all my estate in the tithes*. If a new interest were acquired after the will, it would not pass by words devising all the testator's subsisting interest.

(3) A. bequeathed his black gelding to B. and afterwards gives him away or sells him, and buys another black gelding; this new bought horse shall not pass by the will. *Wentw. Office Executor*, 23.



his leasehold estate, goods, chattels, and personal estate whatsoever, to his daughter, and if she died without issue living, then to the defendant. The testator afterwards renewed a lease with the Dean and Chapter of Windsor; this was held to be no revocation, and the lease passed by the will; the Lord Chancellor observing, that "it was a mistake to suppose this a *specific* legacy; it was a general devise of the whole. Suppose the testator had purchased a new lease, would not that have passed? Why then should not a new term in a lease equally pass? "If I were to construe this a revocation," said his Lordship, "I do not know, but that if a man were to give all his Bank, East India, and South Sea stock, and should afterwards turn it into money, it might as well be insisted that this was a revocation. So that it appears clearly to have been the settled opinion of Lord Hardwicke, that whether the future lease taken by renewal would pass or not by the antecedent will would depend entirely upon the question whether the words of the bequest confined the supposable intention to the thing then actually subsisting, or extended to future interests growing out of it; in a word, whether the legacy was specific or general (4).

But it seems, according to *Abney v. Miller*, which is a very leading case on this subject, that if the renewed lease be not perfected by execution in the testator's life-time, not only will an agreement for such new lease be ineffectual to operate a revo-

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(4) See the case of *Hone v. Medcraft*, 1 Bro. C. C. 261. where the same ground of distinction is adopted. See also *Copin v. Fernyhough*, 2 Bro. C. C. 291.

cation, but the actual surrender will not effect the previous disposition of the lease: it was accordingly held by Lord Hardwicke, that as the college seal had not been affixed to one of the renewed leases in *Abney v. Miller*, though the old lease had been surrendered and the new one prepared and accepted, yet the bequest of such lease was not revoked. But this part of the case is not very clear if it can be said to be intelligible at all, without supposing that, the surrender being made by the same instrument as the new lease, probably being stated as the consideration of the new lease, or perhaps implicitly (5) contained in the acceptance of such new lease, such surrender would not be complete according to the intention of the parties until the change and substitution was completed by the execution of the instrument designed to effectuate the renewal. And indeed, supposing the surrender to be made by a separate instrument, yet the making of the new lease, and the yielding up of the old, being reciprocal acts, perhaps the surrender can scarcely be said to be complete, in equity, at least, until the fresh lease has been granted.

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(5) This surrender in law is without doubt an ademption of a specific devise as much as the express surrender, for in these cases the effect produced is not so correctly expressed by revocation, as by ademption. See *Wentworth's Office of Executor*, 22 et seq. It is not by countermanding the disposition, but by withdrawing or destroying the subject matter of the disposition, that the effect is properly understood to be produced. And whatever destroys the subject of a specific devise, must of necessity annul its operation; thus if after devising an estate held upon lives, the testator purchases the reversion, the devise is revoked and the estate descends. See 2 Atk. 425.

A surrender in law is an ademption of a specific devise.

What propositions appear to be well settled on this subject.

It is very desirable on a subject into which so much refinement has been introduced, to rest upon some steady propositions. All the cases appear to agree in this—that the surrender of the old and the taking of a new lease, will be an ademption or not of the previous disposition by will according as the disposing words are held to import, only the actual thing, or all the testator's eventual interest in it; but whether particular terms denote the one or the other intention is still in some degree open to controversy. It appears according to the report of *Carte v. Carte*, as has before been mentioned, that Lord Hardwicke was of opinion that if in *Abney v. Miller*, the testator had said, "I give all the interest I have in the lease," the will would have passed the renewed lease, that is, such words would have made the bequest general and prospective. Sir John Strange, as appears from the above cited case of *Rudstone v. Anderson*, thought that the bequest was not the less specific by reason of the words *estate and interest*; and we have seen that Lord Hardwicke, in *Abney v. Miller*, suggests other words of future import to be added to the words *estate and interest*, when he points out a mode of embracing within the will future renewals.

It is out of dispute, however, that a testator may by his will pass his future chattel interests whatever they may be, provided they come within the description of the bequest; and that wherever the words are general, property of this nature, though subsequently acquired, is comprehended within the scope of them\*: thus if a testator gives all his per-

\* See the case of *Stirling v. Lydiard*, 3 Atk. 199.

sonal estate whatsoever, and afterwards surrenders a subsisting lease and takes a new one, or makes an entire new purchase of a leasehold estate, both these descriptions of property will pass.

In a very particular case which has been lately determined in the Court of Chancery<sup>1</sup>, another proposition of considerable breadth and certainty on this subject is furnished, viz. that whether the disposing words are to be confined to the specific interest, or are to be interpreted as descriptively embracing after acquired property, will depend not only on the import of the particular words, but upon the *general context* of the will.

In *James v. Dean*, which is the case alluded to, the Chancellor took it to be established in *Hone v. Medcraft*, and *Copin v. Fernyhough*, that where there is a general bequest in the terms of "all my leasehold estates," and the testator afterwards surrenders and takes a new lease, the bequest is revoked. With the highest respect for this truly great authority, I cannot forbear observing that in the cases said to have established this proposition, the devise is not in a general form, but seems to be a disposition of a leasehold estate particularly described and enumerated among other distinct parts of the testator's property. And, indeed, before the general words, "all my leasehold estates," can be held to be a specific disposition of subsisting interests, the opinion and decree of Lord Hardwicke, in *Stirling v. Lydiard*, above cited, seems necessary to be explained out of the way.

<sup>1</sup> *James v. Dean*, 11 Vez. Jun. 383.

But the great point of *James v. Dean* makes the question whether the subsisting interest only or future interests in chattels pass by the will, to depend entirely upon the indications of the testator's intention, and decides that the intention in this respect is to be collected from the whole context, and a comparison of all the parts of the will. The case was shortly as follows :—Thomas James, by his will, dated the 25th of April, 1788, gave and bequeathed to his wife, Judith James, a messuage and some land, at Standgate, held by him under a lease from the Archbishop of Canterbury, and after her decease he gave the same to Sarah James, Jane James, and Elizabeth James, his brother's daughters, their executors, administrators, and assigns, “ for all such term, estate, or interest, as shall be then to come therein, as tenants in common.” The testator then directed that the rent, fine, and fees, for the renewal of the lease of the said premises, at Standgate, should be paid by his wife, during her life, and by his brother's three daughters afterwards, as such rents, fines, and fees became payable ; then after giving some other parts of his property he made the following disposition : “ I also give and bequeath to my wife, Judith James, during her life, all my messuages, lands, and tenements, in Vine-street, in the parish of Lambeth, which I hold by lease, under Sir William East, (being the premises in question) for all the residue of my term and interest therein, and after her decease I give and bequeath the same to my godson, Thomas James, his executors, and administrators, for all the residue of the term and interest I shall have to come therein at my decease.” And then the testator gave to his said wife all his leasehold estate at Floatmead, and all other the estate which he purchased of Anthony Keck, Esq. and which he then held by lease

from Sir William East, she paying for renewing the said lease at the usual times, during her life, and keeping the said premises in good repair, and after her decease he gave the same among the said three daughters of his brother James, as tenants in common. He then made his wife his residuary legatee, and appointed her one of his executors.

The testator was, at the date of his will, in possession, under a lease granted by Sir William East, of the premises, in Vine-street, Lambeth, dated the 12th of August, 1769, to hold for 21 years from the Lady-day preceding, if the lessor and two other persons should so long live, with a covenant by the lessee, that in case of the death of any of the said lives, (being the lives upon which the lessor held those premises, with others from the Archbishop of Canterbury,) before the expiration of the term, and the lessor should renew from the Archbishop, he, the lessee, his executors, &c. would pay a proportionate share with the other tenants of the fines to the Archbishop upon every such renewal; and Sir William East covenanted, upon such renewal of the original lease by the Archbishop, to grant a new lease of the premises thereby demised for the remainder of the term of 21 years, which should be then to come and unexpired. But the lease contained no direct covenant for farther renewal.

The testator died in December, 1790, the lease, which expired on the 25th of March preceding, not having been renewed by him. But he had remained in the occupation of the premises until his death, and half a year's rent under this occupation had been paid by him after the expiration of the lease, during his

life. Sometime after the testator's death ; viz. on the 29th of March, 1791, Sir William East granted to Judith James a new lease of the premises in question, to hold from the 25th of March, for 42 years, if three persons named, or any of them should so long live. The bill was filed by Thomas James, named in the will, against the executors of Judith James, the testator's widow, praying that the renewal of the said lease by Judith James may be declared to be upon the trusts of the will. The answer insisted that she took the new lease for her own benefit, and this was the question.

The Master of the Rolls dismissed the bill, upon the ground that though a testator might so express his intention as to pass any interest existing at his death, yet in this case his intention seemed merely to give the residue of the term he then had from Sir William East, and that nothing more was in his contemplation. Upon the appeal from this decision the Lord Chancellor considered that the equitable question before his Lordship must depend upon the legal question, whether if the lease had been renewed to the testator it would have passed. It is evident that if the new lease had been made to the testator himself in his life-time, this would have been a case for a trial at law, as being a mere legal question, depending upon the import of the words of the will, in respect to such after acquired property. And it seems to be a rule of equity, to be collected from the case we are now considering, that where the disposing words are such that a court of law would have held the subsequent acquisition by renewal in the testator's life-time to have passed by them, any renewals after the death of the testator, by his representatives, shall be for the bene-

It is a rule that where the disposing words would have passed the leases if renewed in testator's life, any renewals after his death by

fit of the persons to whom the beneficial interest in the subsisting lease was devised.

his representatives, will pass by such words.

Now, in this case, though the testator lived out the lease which he had given by his will to his wife for her life, and at her decease to Thomas James, yet as he continued to occupy till his death, and paid rent, he became a tenant from year to year, which was an interest devisable and transmissible\*. This legal interest, though become a tenancy only from year to year, attracted to itself that sort of tenant-right, or good will, on which the claim to a renewal would have grounded itself, for it was a sort of excrescence out of the old subsisting lease which had expired. The Court therefore considered, that if this interest would pass by the will, such benefit of renewal would pass also as an adjunct to it, subject to the operation of the same testamentary disposition.

A tenancy from year to year devisable and transmissible.

And the good will or tenant-right which accompanies it passes with it.

It was therefore said by his Lordship, that whether the interest of the renewed lease, (supposing such lease to have been renewed in the testator's lifetime) would or would not have passed, must be decided, to raise any question between these parties upon the record. For the lease not having been renewed, and the testator being at his death possessed of no larger interest than from year to year, the doctrine cannot be applied, unless it would have been applied, if he had been lessee in the renewed lease. His Lordship then laid it down as a sound rule of construction, that when words are, by their import, prima facie equivalent to pass future interests in personal estate, that construction ought to prevail, unless

When words are prima facie sufficient to pass future interest in person-

\* See *Doe v. Porter*, 3 T. R. 13.



alty, that construction ought to prevail, unless controlled by the context.

the context, in sound interpretation, calls for another construction; and this depends upon the context of the whole will.

His Lordship thought that though there was a difference between the leases, the lease in question not containing the same direct covenant for renewal which occurred in the others, yet there was enough in the lease in question pointing that way, to lead the testator to think that the expiration of the term would not put an end to the interest. Some parts of the will, particularly the last bequest, must be interpreted to pass the renewed lease, and the different clauses in the will are much the same in effect, though expressed in different words. The obligation upon the wife to renew from time to time, shews that he meant not only the interest *he* had in the present lease, but the interest *she* would acquire under the covenant. Between the bequests accompanied with this express direction to renew, is the bequest of the premises in question; and the person who was tenant for life of these premises, is the wife and the general residuary legatee. His general intention therefore was, that as to the particular part, so specially given to her, she should take only a life interest, and as general residuary legatee she should take absolutely for her own benefit (7).

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(7) Had the testator held over after the expiration of his term, and died in the mere occupation of the premises as a tenant by sufferance, he could have given no title at all by his bequest. The particular legatee or legatees could have taken no interest in such a subject under his will. And supposing, in such a case, another person instead of the executrix to have been the residuary legatee,

## SECTION XII.

*Cancelling.*

AMONG the methods whereby a will may be revoked is that of the destruction of the instrument itself by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent ; which methods of revocation are excepted expressly out of the statute of frauds. But we are to observe that it has been always an established point, both before and since that statute, that the act of cancelling or destroying a will, is in itself an equivocal act, and that its operation as a revocation depends upon the intent with which it was done ; which must be made to appear : for if a man were to throw ink upon his will instead of sand, though it were a complete defacing or obliterating of the will, it would not be a revocation : or if a testator, designing to cancel his former will, were accidentally to cancel one subsequently made and

Cancelling, an equivocal act.

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the executrix renewing the lease, would, in equity, according to the opinion of his Lordship, have been considered as doing it for the benefit of the residuary legatee, who, in preference to the particular legatee, would have a right to the benefit of such casual opportunities as arose out of the succession to the *mere occupation* ; for the particular bequest could operate nothing, and must have been considered as making no part of the will. But in this case, as the executrix was also general legatee of the residue, it appeared to his Lordship that she would have been precluded from holding it for herself.

If a testator makes a second will, and in terms revokes the first, but it appears that the revocation of the first will was only to give effect to the second, the second will is no revocation, if ineffectual for want of the proper attestation.

meant to be his last will, such an act would clearly be no revocation: in these cases the intention must govern. This was the ground of the determination in *Onyons v. Tyrer*\*; from which case it appears, that if a testator cancels his first will, and by a subsequent will, not properly executed, as by being neglected to be subscribed by the three witnesses in the testator's presence, sets up a devise contained in the first will, the first will, as to such devise, stands unrevoked; notwithstanding the testator in his second will expressly revokes his first, and such express revocation would, in other respects, be available as a declaration in writing within the statute. For it is plain he did not mean to revoke his first will, as to the particular lands devised by it, unless he might by the second will, at the same time that he revoked the first, set up the like devise, so as to take effect by the second will. And if by the latter will the premises had been given to a *third person*, it should never, said the Court, have let in the heir; since the meaning of such second will would still be to give to the second devisee what it had taken from the first, without any consideration had to the heir; and if the second devisee took nothing, the first could have lost nothing.

It was plain that the testator did not mean to revoke the former will by cancelling simply, as a self-subsisting independent act; but by substituting at the same time another perfect will in its place, and not otherwise; and therefore the cancelling was but a circumstance, shewing that he thought he had made another good disposition by the second will. The effect of such cancelling depended upon the validity of

the second will, and ought to be taken as one act, done at the same time; so that if the second will was not valid, as the testator thought it was, and without which he would not have cancelled the first, the cancelling of the first will being dependent thereon, ought to be looked upon as null and inoperative also. In a word, it was relievable in equity, under the head of accident or mistake.

*Hyde v. Hyde*<sup>b</sup>, is also a case which shews that the cancelling (1) or tearing of a will must be done *animò revocandi*, to have the effect in law of destroying the validity of the will. The case was briefly as follows: A man made his will in writing, and thereby devised all his real and personal estate to his wife, her heirs, and executors, in trust, to pay his debts and legacies; and then devised several legacies to his children and other persons, and concluded thus:—"In witness whereof I have to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof, to be left in the hands of A. set my seal to every sheet thereof; and to the last of the said sheets

<sup>b</sup> 1 Eq. C. Abr. 409.

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(1) It is obvious that the word, 'cancelling' is used here only to signify the manual operation of tearing or destroying the instrument itself, and not the virtual effect of destroying its validity; and in this sense only is it used in the clause of the statute of Charles, where its effect of revoking a will is excepted out of the restriction thereby created. But when the cases speak, as they sometimes do, of the *animus cancellandi*, it is manifest that they use the word as importing the same as *revocandi*, and not merely as the sign or mode of revocation.

my hand and seal ;" which will was properly executed according to the statute.

The testator being afterwards desirous of adding other trustees to his wife, and to make some alterations in his will, sent for a scrivener, and gave directions to prepare a draught of instructions for another will, which the scrivener did accordingly, and the testator read it over and approved of it, and set his hand to it; and, thinking he had now made a new will, he pulled out of his pocket his first will, and tore off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing? " Why," says he, " I am cancelling my first will." " Pray," says the scrivener, " hold your hand ; the other will is not perfected ; it will not pass your real estate, for want of being executed pursuant to the statute of frauds and perjuries ;" to which the testator replied, " I am sorry for that ;" and immediately desisted from tearing off any more of the seals ; and soon afterwards died without having done any thing further to perfect the second will, or to cancel the first. After his death, on application to the spiritual court by the wife, who was made executrix to the second will, it was sentenced to be a good will as to the personal estate, and she was admitted to prove it.

On a bill brought by the legatees against the wife, and other trustees, to have a specific performance of the trust in the first will, and that the estate might be sold pursuant to the directions of that will, it was insisted that the first will was revoked either by making the second, or by tearing off the seals from the first ; but the Lord Chancellor held, that the subsequent will could be no revocation as to the real estate, not being

executed, according to the statute of frauds, and that as to tearing off the seals from the first eight sheets, that not being done *animo cancellandi*, was no revocation; but because the spiritual court had sentenced the second will to be a good will of the personal estate, his Lordship also held it good to that extent, and that such legatees of personalties in the first will as are left out in the second, must lose their legacies; but as to such as had legacies by the first will charged on the real estate, if the same legacies were devised them by the second will, that they should continue chargeable on the real estate; provided such legacies were not increased or enlarged by the second will; for though the second will was not sufficient in itself to charge the real estate, yet since the real estate remained well devised by the first will, they should be still secured by that real estate; for they were not devised out of land like a rent, but only secured by land, which before was well devised; but as to the new absolute personal legacies devised by the last will, they should be chargeable only on the personal estate; and should have the preference in being first paid out of the personal estate, before the other legacies in the first will charged upon the real estate, because they had several funds out of which they might be paid—the personal legacies in the last will out of the personal estate, which was well devised by that will; and the legacies charged or secured upon the real estate, which was devised by the first will, out of the real estate.

In the cases last produced the mere mechanical act of tearing is shewn to be equivocal, and to yield to the inference of an intention not to revoke arising from other circumstances. Parol evidence, therefore,

What evidence is admissible to determine the intention; and what

tearing or  
burning is  
sufficient  
to revoke.

of the facts accompanying the act of cancelling is clearly admissible. The principle, however, of the admissibility of parol evidence for this purpose, requires, that in a case where the intended cancelling or destruction of the instrument has been prevented by fraud or contrivance, affirmative proof of the *animus revocandi* should also be received, and that effect should be given to the intention so established. Even if such intention, so endeavoured to be defeated by fraud, were manifested by *no act* of the testator, it would be consonant to the general maxims of courts of equity to give effect to the intention, and to treat as perfected that which would have been perfected but for the fraud. So the slightest act of tearing, or an incipient burning amounting only to scorching, will satisfy the statute, where the intention to revoke can be manifested by proof of accompanying acts, or even declarations: but that, without proof of fraud, or partially executed intention, parol evidence could be received to shew a design to cancel, unaccomplished through mistake or accident, no case has yet established; such a latitude would indeed seem to frustrate the caution of the legislature in respect to this object of the statute of frauds.

The case of *Bibb v. Thomas*<sup>c</sup> perhaps marks the boundary in respect to the admissibility of this evidence. A testator, who had for two months together frequently declared himself discontented with his will, being one day in bed near the fire, ordered M. W. who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat erased. He opened it, looked at it, then gave

it a slight rip (2) with his hands, rumbled it together, and threw it on the fire, but it fell off. M. W. took it up and put it into her pocket. The testator did not see her take it up, but seemed to have some suspicion of it; as he asked her what she was at, to which she made little or no answer. The testator afterwards said that that should not be his will, and bid her destroy it, to which she replied, "So I will, when you have made another;" but afterwards, upon repeated enquiries, she said she had destroyed it.

The testator afterwards told another person that he had destroyed his will; that he should make no other until he had seen his brother J. M. and desired the person to tell his brother so, and that he wanted to see him. He afterwards wrote to his brother, saying, "I have destroyed the will which I made; for upon serious consideration I was not easy in my mind about the will;" and desired him to come down, saying, "If I die intestate, it will cause uneasiness." The testator however died without making another will. The Jury, with the concurrence of the Judge, thought this a sufficient revocation of the will; in which opinion Lord Chief Justice De Grey and the whole court, upon a motion for a new trial, concurred; the Chief Justice observing, that this case fell within two of the specific acts described by the statute of frauds;—it was both a burning and a tearing; and that throwing the will on the fire with an intent to burn it, though it

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(2) Tearing is a sufficient revocation within the statute without cancelling by tearing off the seal, if the act be accompanied by any circumstance demonstrative of the intent to revoke; See *Bibb on dem. of Mole v. Thomas*, Blackst. Rep. 1043.



was very slightly singed only, and fell off, was sufficient within the statute.

A cancelled will is not necessarily revived by the destruction of a substituted will.

It has been observed in a former part of this treatise, in commenting upon the case of *Onyons v. Tyrer*, that the cancelling is an act not necessarily operating as the revocation of a will ; it is a circumstance presumptively indicating and expressing the intention, and presumptively also the execution of that intention ; but it may be explained away by particular circumstances. In *Onyons v. Tyrer* the act of cancelling was in some sort merely conditional ; it was for the purpose of making way for another disposition, and only for that purpose ; and that disposition being never legally effectuated, the act of tearing the first will being unaccompanied with any absolute intention of revocation, was held to be inoperative. But where the act of cancelling has not such immediate reference to another disposition by a new will, but is done upon grounds of absolute dissatisfaction with the will already made, the first will shall not be revived by the cancelling or destroying of a second.

If indeed the first will could be revived, after having been deliberately cancelled and its efficacy destroyed, by the cancelling of a subsequent will, as well might a will *de novo* be made by courts of justice for a party deceased, out of mere facts and conjectures. There is a great and manifest difference between permitting the act of cancelling to be qualified by reference to the accompanying facts, which may shew it to have been done prospectively and in subserviency to a fresh testamentary disposition, and permitting proof of altered intention inferred from the cancelling of a second will, to re-establish the prior will after it has

been once deliberately and unconditionally cancelled. This would be a republication by implication, which we have the authority of Lord C. J. Parker<sup>a</sup>, afterwards Lord Macclesfield, for saying, cannot be done since the statute of frauds.

The case of *Burtenshaw v. Gilbert*\* will exemplify the observation just above made. There the testator, in 1759, duly executed his last will and testament, and also a duplicate thereof, but at the same time declared that it was not a will to his mind, and that he should alter it. In 1761 he made another will, which was also duly executed; the devises in which were different from those in the will of 1759; and at the end of it there was a declaration by which he revoked all former wills. After executing the latter will, the testator took one part of the old will in his hands, tore off the name and seal; and directed the person who had made the new will, to cut off the names of the witnesses to the old one, which he did in the testator's presence. The testator at the same time said that a duplicate of the former will was in the hands of W. a devisee therein. He then delivered the new will to the person that made it, requesting him to take it away with him to his house, and keep it, for reasons which he mentioned. Afterwards a principal devisee in both of these wills died; soon after which the testator sent for the last will, and in 1762 that will was returned to him. The testator before his death, sent for his attorney to make a new will, but became senseless before he arrived. On his death, one part of the will of 1759, and also the will of 1761, were found together in a paper, both cancelled. The other part of the will of

<sup>a</sup> Com. 385.

\* Cowp. 49.

1759 was found uncanceled in the testator's room, among other deeds and papers : how it came there did not appear (3) ; but W., a devisee therein, was in the house when the searches were made. The question was, whether the testator died intestate or not ; that is, whether the will of 1759 was revoked ? And it was held that the will of 1759 was revoked ; first by the new will of 1761, which was a complete, legal, and effectual will ; and would have revoked the former, whether it had been cancelled or not, because at the end of it there was a declaration revoking all former wills ; secondly, because the testator had actually cancelled the will of 1759.

If a testator makes duplicates, and cancels one, the effect of the other is destroyed.

This case also confirms the dictum of Sir Thomas Powis, at the end of the case of *Onyons v. Tyrer*<sup>t</sup>, that if a man having duplicates of his will, cancels one of such duplicates with the intention of destroying his will, this is a good revocation of the whole will.

<sup>t</sup> 1 P. Wms. 345.

Of the presumption from finding a cancelled and an uncanceled will.

(3) In a very recent case in chancery it was held, that where a testator cancels the part in his custody, the strong legal presumption is that the duplicate in the possession of another was not meant to prevail—That if both are in the possession of the testator, the one cancelled, and the other uncanceled, the presumption of revocation still holds ; but it has less strength.—That if both are in the testator's possession, the one altered and cancelled, the other in statu quo prius, the presumption against the operative existence of either may still remain, but with a strength yet more diminished. It seems to have been the doctrine of that case that either of these predicaments is enough to constitute a prima facie case for the heir, so as to throw the burthen of proof on the devisee, who is to encounter the presumption by evidence of contrary intention, see *Pemberton v. Pemberton*, 13 Vez. jun. 290.

In *Burtenshaw v. Gilbert* the first will was cancelled; but it has been decided, that where a second will is made, the first remaining uncanceled, and afterwards the second will is cancelled, the first is in force as a good will at the testator's death. Thus in *Goodright v. Glazier*<sup>2</sup>, where a testator, having made a will of lands, and afterwards given the same lands to the same person by another will, omitted to cancel the former, but before his death cancelled the latter, and both were found in his custody at his decease, the second cancelled, the first uncanceled, the first will was held to be effectual; the court observing "that a will is ambulatory till the death of the testator: if he lets it stand till he dies, it is his will; if he does not suffer it so to do, it is not his will. Here, though the testator made two wills, yet the second will never operated; for it was only intentional, and the testator changed his intention; and cancelled the second so that it had no effect: it was indeed no will at all, being cancelled before his death: then the former, which was never cancelled, stood as his will."

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## SECTION XIII.

*Alteration and Erasure.*

A WILL is not revoked by alteration or erasure beyond the particular object of such alteration or erasure; though this seems to have been a point

<sup>2</sup> 4 Burr. 2512, and see the book 44 Ass. pl. 36.

never precisely in judgment before the case of *Larkins v. Larkins*, which was lately decided in the Court of Common Pleas\*. We must be careful, however, not to confound erasure with alteration; since the latter, if it consists in making any new gift or disposition, is to that extent another devise, and will clearly require the will to be re-executed according to the statute. The case of *Larkins v. Larkins*, was in effect as follows:

Difference in the effect of alteration and mere erasure—alteration being a fresh exercise of the disposing power requires the will to be re-executed, to give effect to the alteration, if of freehold estate.

William Larkins by his last will, duly executed, devised his lands in M. to his brother, John Pascall Larkins, Samuel Enderby the younger, of Aldermanbury, in the city of London, Esquire, and George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs and assigns, upon trust, to sell the same lands for the purposes in the will mentioned. He also gave the residue of his estate and effects to the same persons, and appointed them his executors and the guardians of his daughters. After this will was executed, the testator, with his own hand, made the following alterations: in the first devise to the three trustees, the words "the younger" and "George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire," were struck out by a pen drawn through them: in the bequest of the residue, the words "the younger" and "George Smith, their heirs, executors," were struck out; but over the words "heirs, executors," was written the word "stet;" in the clause appointing guardians, the words "the younger" and "George Smith," were struck out; and, lastly, in the clause appointing executors, the words "the younger" and "George Smith," were struck out. The testator never in any

manner re-executed or re-published his will after making the above-mentioned alterations. And the question was, whether the devise of the real estate to be sold was revoked, by the testator's having struck out the name of *George Smith*, one of the trustees, after the execution of the will.

The ground upon which it was contended that it was revoked was mainly this, that after devising the same estate to two persons, by revoking that devise as to one, the testator had necessarily altered the estate of the other by enlarging it; and that if it could operate at all, it must operate as a new gift; for whatever alters either the quantity or quality of the estate of the devisee must be considered as a new devise. This position, however, in which the strength of the argument for the total revocation consisted, was positively denied by the court; by whom it was observed, that in a court of law the trustees must be considered as joint tenants in fee; that whatever alteration in the interest of the other trustee was created by this erasure, it was an alteration not arising from a new gift, but merely from a revocation. But Mr. Justice Chambre put the point thus: the devisees being joint-tenants, are scised per my et per tout; but if one joint-tenant die in the life-time of the testator, the other joint-tenant takes the whole of the estate, though it never vested in him during the life of the testator; the reason of which is that the original devise is *sufficient to pass the whole interest* (2).

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(2) See *Page v. Page*, 2 P. Wms. 489. *Man v. Man*, 2 Strange, 905. Mr. Justice Chambre seems to have put the decision of this case upon its safe ground, viz. that the will was not altered by the erasure, as it was made to carry no more than it was originally

Had this been the case of a tenancy in common, upon the erasure of one name, the remaining two would take no more than the two-thirds of the estate (3).

An erasure of a part of a will, therefore, does not necessarily operate as a revocation of the whole. And it is always to be recollected that the statute of frauds gave no new or positive efficacy to these symbolical modes of revoking a will, but left them upon the same footing as they stood at common law<sup>b</sup>.

Short on the demise of *Gastrell v. Smith*, which

<sup>b</sup> See Carthew. 81.

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framed to carry, since each joint-tenant takes the whole estate. But it would be a very different case if an erasure added to the *quantity* of interest carried by the will: as, suppose the words 'for and during his life,' after a gift by a testator of all his freehold estate to B., to be erased, thus converting an estate for life, into a fee. And even if the erasure only change the quality of the estate, it would seem to be a fresh exercise of the disposing power, and to require a fresh execution; as, if after a gift to two and their heirs, the words 'equally to be divided between them' were to be struck out, this would not be merely a revocation but an altered devise.

(3) Where a devise is to several as tenants in common, and one dies in the life-time of the testator, the devise to him becomes lapsed. *Bagwell v. Dry*, 1 P. Wms. 700. and *Page v. Page*, 489. But if a testator devise to A. B. and C. as tenants in common, and at the time of the devise only C. is living, although C. will not take the whole estate, yet there is no lapse, properly speaking, of the shares intended for A. and B.; but they pass with the residue, or go as if they had not been mentioned. If, however, the devise be to a class of persons, generally, as to the sisters of T. H., and only one out of several was living at the time of the devise, who survives the testator, such survivor becomes intitled to the whole. *Doe and Stewart v. Sheffield*, 13 East, 526.

was determined a few years ago in the Court of King's Bench<sup>c</sup>, was the case of an erasure of the name of one of the trustees, accompanied by the additional fact of the substitution of others in his place. There a testator devised lands to two trustees, in trust for certain purposes, by a will duly executed and attested; and he afterwards struck out the name of one of those trustees and inserted the names of two others. The will was not afterwards republished, but the court held that his intent appearing to be only to revoke, by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the due execution of such altered will under the statute, it should not operate as a revocation; or, at most, it could only operate as a revocation pro tanto, as to the trustee whose name was obliterated. Here it was said, in support of the revocation, that the insertion of the two new trustees in the room of the one whose name was obliterated, distinguished this case materially from those of *Larkins v. Larkins*, and *Humphries v. Taylor*<sup>d</sup>; because it manifested the devisor's intent, that the remaining old trustee should not take alone.

But the court observed, that the facts of the case plainly shewed that the testator had no object but to change his trustees; and it would be unreasonable when he had not by any thing he had done indicated a disposition to dispose of his lands to different purposes from those declared by his will, to infer that he designed that his will should become inoperative, and so to let in his heir at law by what he did, rather than to conclude, that he thought he had by the alterations

<sup>c</sup> 4 East, 419.

<sup>d</sup> 5 Bac. Abr. tit. Wills and Test. 363. Edit. Gwyllim.



introduced made a valid disposition of his estate to the new trustees, and had no design to alter his will except so far as such obliteration and alteration could effectuate that purpose, by substituting the persons whose names he interlined in the stead of him whose name was struck out. If, then, the testator meant no revocation but by means of that, which he through mistake supposed to be a valid disposition to others, and had no intention to revoke by the obliteration he has made, but by an effectual substitution meant to be made of others in the room of him whose name was so obliterated, the case must be governed by that of *Onyons v. Tyrer*.

But supposing the obliteration of the name of the one trustee to have revoked the devise as to him, still the heir would not be let in, for it might be still contended that the effect of the obliteration in this case was at most to revoke only the devise to that trustee, whose name was struck out; and, therefore, giving to that obliteration its full effect, it would still leave the devise to the other trustee in full force, and competent to sustain all the trusts of the will in exclusion of the heir at law.

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#### SECTION XIV.

##### *Mistake.*

**PAROL** and extrinsic evidence to control an express revocation, or to effectuate an alleged intention to revoke, not manifested by any act of the tes-

tator, ought not, in general, to be received; and the difference is very plain between the admission of such evidence to contradict what is expressed, or establish what has no support from any other indications, and its admission for the purpose of explaining, by accompanying acts or declarations, some outward sign of a revoking intention, equivocal in its nature, as the acts of cancelling, obliterating, and tearing, above considered. But even express revocations have been permitted to be controuled by collateral evidence, when that evidence has been furnished by the instrument itself, as where the reasons given by the testator for the revocation of a former will are professedly founded upon a mistaken apprehension of facts. *Campbell v. French*<sup>a</sup>, is a case of this sort; which though decided in a Court of Equity, proceeded upon a principle of common law. There the testator by his will gave legacies to A. and B. describing them as grandchildren of C. and their residence to be in America; and by a codicil he revoked these legacies, *giving as a reason*, that the legatees were dead; but the supposition as to that fact being erroneous, the legatees were held to be entitled under the will, upon proof of identity (1). But where a testatrix by

Where a testator expressly revokes under an obvious misapprehension of facts, the revocation fails.

<sup>a</sup> 3 Vez. Jun. 321.

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(1) The case mentioned by Cicero, in his *Treatise de Oratore*, lib. 1. c. 38. has been often cited, and relied on, as a sort of authority in our Courts, more especially in those where the civil law is taken as a guide, for admitting evidence of this mistake of facts to affect the validity of a testamentary disposition. We are to observe, however, that in that case the error was occasioned by palpable misrepresentation, and that such misrepresentation was the immediate and sole impelling motive with the testator for altering his

codicil gave to A. the legacy which she had given by her will to the children of B. prefacing such alteration thus, "As I know not whether any of them are alive, and if they are well provided for," though they were in fact living, A. was nevertheless held to be entitled, the words above cited being construed to mean that if they were living they were well provided for.

The mistake should appear to be in that which constituted the impelling motive to the revocation

But before such express revocation can be vacated upon such grounds, it ought, I conceive, to appear very distinctly, that the mistaken facts were the impelling motives (2)\* to the revocation; and it must be remembered, that in the *Attorney General v. Lloyd*<sup>b</sup>, Lord Hardwicke observed, that "it is a very nice thing to say that because the reason a man gives for his devise is false, that therefore his devise shall fail, and how far that will extend I cannot say." The case of

<sup>b</sup> 3 Atk. 552.

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will. "What cause (says Cicero) could be more important, than that of the soldier, whose death being announced at home by a false messenger from the army, the father, trusting to the report, made another his heir, and died." There was also another question, arising upon that case, on the principles of the civil law, viz. whether a son could be disinherited of his patrimony, (for by that law he had an inchoate sort of property in his father's effects), whom the father had neither appointed heir by his testament, nor disinherited by name? And this last reason seems to have been alone objection enough, as the will was by such omission what the civil law denominated "*testamentum inofficiosum*." But the error as to the fact seems also to have been considered as a good ground of objection by Cicero. See also *James v. Greaves*, 2 P. Wms. 270.

(2) If a man gives a legacy to his wife by the description of his *chaste* wife, evidence of her incontinence is not admissible. And if a testator, out of love and affection to a child, supposing it to be his

the Attorney General *v. Lloyd*, was shortly as follows:—J. M. by his will, dated February the 8th, 1734, gave particular lands, and his personal estate to be laid out in lands, to charitable uses, and by a codicil, dated July 12, 1736, declared that if by the mortmain act the estates could not pass to those uses, he gave them to M. B. and his heirs. By a second codicil of the 17th of March, 1736-7, reciting that he had been advised that the devise of his *lands* was void, gave his *personalty* to the same charitable uses, and his real estate to M. B. The mortmain act passed in 1736, and the testator died the 8th February, 1737. The advice upon which the testator professed to proceed, appeared not to be well founded; for it had been decided in *Ashburnham v. Bradshaw*<sup>c</sup>, by the certified opinion of all the Judges<sup>d</sup>, that a devise of lands to charitable uses, made before the statute of mortmain, *notwithstanding the testator survived the statute*, passed the lands.

But Lord Hardwicke reasoned thus, on the principal case: “That the testator was so advised, was a fact, in his own knowledge, and he grounded the devise in the codicil upon this advice, and not upon the

<sup>c</sup> 2 Atk. 36. and see the cases in note 1. Ed. Saund.

<sup>d</sup> Except Denton J. who was in ill health.

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own, had given it a legacy, and it turns out that the child was not his own; in such a case, according to the opinion of Lord Alvanley, in *Kennell v. Abbott*, the legacy would not be revoked by the mistake. But where a legacy was given to a person under a particular character, which he had falsely assumed, and which alone could be supposed to be the motive to the bounty; as, where a woman gave a legacy to a man in the character of her husband, whom she described as such, but who at the time of the marriage-ceremony with her, had a wife living, the legacy failed. *Kennell v. Abbott*, 4 Vez. Jun. 802.

reality of the law; for, however that might turn out, he might be anxious to quiet a doubtful question, and to prevent its being litigated after his death, by settling it upon some certain foundation." But the principal reason which weighed with his Lordship was, that he doubted whether the new disposition by the codicil was put singly upon the point of law, the words of which were, "It being my intention that the charity should be continued, and being advised my personal estate can be given, I do, therefore, by this codicil, give my personal estate to the charitable uses before-mentioned; and I do hereby give my real estate to M. B." A case was made for the opinion of the Judges of the King's Bench, and that Court certified in favour of the devise of the real estate by the codicil.

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#### SECTION XV.

##### *Accident and Surprise.*

THERE may be something also in the circumstance of a testator's being prevented by surprise, or even by a sudden accident, when coupled with other particulars in his situation indicating the probability of an intended revocation, which may be allowed to operate a revocation of his will. *Wells v. Wilson*\*, determined at the Cockpit in 1756, on appeal from the West Indies, lends support to this supposition; which case was as follows:

\* Cited by Sir Geo. Hay, in *Shepherd v. Shepherd*.

A. wrote his will on one side of a sheet of paper, but neither signed nor sealed it. On the other side he wrote another will, and signed and sealed it. They appeared to be both written at the same time, though it seemed impossible to determine which had been written first. There was a trifling difference. He had provided for the infant then in ventre sa mere, and who afterwards was born in his life-time. Sometime after this A. died, leaving his wife ensient with a child which was afterwards born. The question was, whether the will was thereby revoked, as the posthumous child was entirely unprovided for. Evidence was produced to shew that in his most serious moments he had declared that he had made no will, but was resolved to do so on the first opportunity, mentioning that the situation of his family required such precaution.

While he was in this state of mind, he had the misfortune to receive his death wound by a fall from his horse, and in the short interval between the fall and his death, his thoughts were employed on the making of his will; and accordingly he sent for a professional person; but losing his senses and dying soon after, the paper was all that was found. The great doubt with the court was, whether the will was prior or posterior to the paper written on the back of it. And in order to come at this, they adjourned the case for six months, that they might enquire further as to that fact. But this enquiry was fruitless; and therefore the Court directed that it should stand for argument on its particular circumstances. And at length, the Lords of the Council, upon a view of the whole matter, and the co-operating argument of a child's being then unprovided for, set aside the

will. The decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that and the frequent declarations of the testator; the state of his mind; and his repeatedly declared intention in the interval between the fall and his death."

This is the manner in which the judgment in that case is accounted for by the learned Judge of the Prerogative Court, in *Shepherd v. Shepherd*. He seems, however, to have omitted that circumstance in the case, without adverting to which, the propriety of admitting the evidence of declared intention, seems palpably open to the objections arising from the statute of frauds, viz. the suddenness of the accident, which was a surprise upon those intentions so natural under the circumstances of the testator's family to have existed in his mind, and which afforded a foundation for the reception of that testimony, which, without such a foundation, has always been rejected by the better opinions. A case of this sort is mentioned in the first volume of Roll's Abridgment<sup>b</sup>. A. made his will, according to the statute, and afterwards revoked it by parol, and then declared his intention to alter it when he came to D., but, before he could come to D. was murdered; the will was held to be revoked.

## SECTION XVI.

*Of the Revocation of Wills made under Powers.*

IN a former part of this Treatise, where the execution of wills was under consideration, that part of the subject was viewed in its connection with wills made under, and in execution of, powers: it seems important also to consider how the law in respect to revocations applies to this description of wills.

It appears to be a general, established, point, that the instrument by which a power is directed to be executed, must have the requisites which specifically belong to its nature, and proper constitution, and be attended also by all the train of incidents which legally accompany it\*. Upon this principle it is that a will made in execution of a power, is, to all intents, a will: it is ambulatory and incomplete till death, and alterable and revocable by cancellation, or any of the methods whereby a will, in the strictest and most absolute sense, is so affected. It is also equally clear that if an appointee under a power executed by will, die before the appointer, the interest under the appointment fails by lapse, as in the ordinary cases.

An appointment by will works by the will according to the nature and qualities of such an instrument.

This rule is universal. It extends to a will of copyhold, which, though not considered as the act by which the estate is transferred, (that being the operation of the surrender), is nevertheless in its own nature specifically a will, though in its instrumentary

So in respect to a will of copyhold, though not properly the act by which the estate is transferred.

\* 2 Freem. 61.



operation it is only directory of the uses of the surrender. Thus, if a copyholder surrenders to the use of his will, and then makes his will in favour of A. and survives him, the benefit is gone; for, as a will, the appointing instrument is inefficacious till the death of the appointer, and if the appointee is not then in existence, the gift cannot take place<sup>b</sup>.

It cannot be doubted, that an appointee under a power must claim according to the nature of the instrument by which the power is directed to be executed. Thus, if a power is given by deed to appoint lands by will, and the person to whom the power is given makes his will accordingly, and gives the lands to A. *and his issue*, which words in a deed convey only an estate for life to the grantee, though the devisee takes properly under the power; yet, because the appointment is by will, the words are construed to convey an estate tail. So, it is conceived, if it were "to A. for ever," the estate would be construed a fee simple for the same reason.

Upon the same grounds, such an appointment by will, in execution of a power, is held to be revocable<sup>c</sup>; and therefore, though, where a power is executed by deed, unless a power of revocation is reserved by the deed, (and such fresh reservation of power to revoke may be made toties quoties,) the appointment cannot be revoked (1), yet if it be

<sup>b</sup> See the great case of the Duke of Marlborough v. Lord Godolphin, 2 Vez. 61.

<sup>c</sup> 2 Vez. 77. S. C. *ibid.* 610. and see Robinson v. Hardcastle, 2 Bro. C. C. 30. Reid v. Shergold, 10 Vez. Jun. 370.

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(1) Hatcher v. Curtis, 2 Freem. 61. Such appointment by

executed by will, no such fresh power of revocation need be reserved<sup>a</sup>; the nature of the instrument supplies it.

By the case of *Cotter v. Layer*<sup>\*</sup>, which has been already cited to shew that a covenant entered into for valuable consideration amounts to a conveyance in Courts of equity, and is therefore, in those Courts, held a revocation of a will, it also appears that, where the will works as an appointment under a power, it is equally revoked in equity by such executory contract under seal. In that case, though the will was made in execution of a power by a married woman, who cannot in strictness make a will at all,<sup>(2)</sup> and the conveyance was only in fieri, yet the first instrument was adjudged to be revoked by the second.

Lord Hardwicke decided the case of *Oke v. Heath*,

<sup>a</sup> *Hatcher v. Curtis*, 2 Freem. 61. and see 1 Vez. 139. 1 Bro. C. C. 533. 2 Bro. C. C. 319.

<sup>\*</sup> 2 P. Wms. 662.

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deed cannot be revoked without a fresh reservation of a power in the executing instrument for that purpose, though the original deed should expressly authorize such future revocations, as was adjudged in the leading case of *Hele v. Bond*, Prec. in Ch. 474.

(2) It is true, nevertheless, that if a married woman, with the consent of her husband, make a will, the same must be proved in the Ecclesiastical Court, *Mariot v. Kinsman*, Cro. Car. 219. and the will of a femme covert cannot be given in evidence until it has been proved in the Spiritual Court; see *Jenkin v. Whitehouse*, Burr. 431. and *Stone v. Forsyth*, Doug. 707. where Lord Mansfield says, if the Ecclesiastical Court will not grant probate, the proper course is to appeal to the delegates. Mr. Douglas in note († 150) ib. observes, that the regular course in cases like this, is for the Spiritual Court not to give probate of the will, but administration with the will, as a testamentary paper, annexed.—See *Ross v. Ewer*, 3 Atk. 160. and note (1) by M. Sanders.

agreeably to this doctrine, declaring that the foundation of his opinion was, that wherever such a power to appoint is given to a married woman, which she executes by will, it is subject to all the qualities of a will. She has, said his Lordship, executed her power by will, and called it so throughout. The whole frame is testamentary. And although this arises out of her power to make a will, and it is a general notion of law as to powers, that any one taking under the directions of the will, takes under the power in the same manner as if their names were inserted there; yet they must take according to the nature of the power and instrument taken together. And in another place<sup>c</sup>, Lord Hardwicke is more explanatory on this particular point, where he says, that the meaning of persons taking *under* the power, as if their names had been inserted in the power, is, that they shall take in the same manner, as if the power and instrument executing the power had been incorporated in one instrument: they shall take as if all that was in the instrument executing had been expressed in that giving the power. So it is, said his Lordship, in the appointment of uses. If a feoffment is executed to such uses as one shall appoint by will; when the will is made, it is clear that the appointee is in by the feoffment; but he has nothing from the time of the execution of the feoffment, so as to vest the estate in him. The estate will vest in him according to the nature of the act done, and the appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the creation of the power, but according to the time of the act executing the power<sup>d</sup>.

<sup>c</sup> 2 Vez. 78.

<sup>d</sup> And see *Venderzee v. Aclom*, 4 Vez. Jun. 771.

## SECTION XVII.

*Subsequent Marriage, and Children.*

AMONG implied revocations, and, as such, not falling within the statute of frauds, is that which is produced by a subsequent marriage and the birth of a child or children, on which point the case of *Lugg v. Lugg* (1), is said to have been the first affirmative decision. The point was said to have been afterwards doubted, but was at length recognised as a rule of law<sup>a</sup> though it received no adjudication as to real estate till the case of *Christopher v. Christopher* was determined in the Court of Exchequer in 1771<sup>b</sup>. It appears from the report in *Ambler*, of *Parsons v. Lanoe*, that Lord Hardwicke entertained doubts as to the applicability of this rule to real estates, but it has since been carried to that extent, if that could be said to be extending the rule which was no enlargement of its principle; for there seems to be no foundation for saying, that the presumption on which it grounds itself is less applicable to one description of estate than another (2).

The general rule is, that marriage and the birth of a child is an implied revocation as well of a will of real as of personal estate.

<sup>a</sup> *Brown v. Thompson*, 3 Eq. Ca. Abr. 413. *Parsons v. Lanoe*, 1 Vez. 189. *Ambler*. 557.

<sup>b</sup> See 4 Burr. 2171. 2182. *Dougl.* 35.

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(1) 2 Salk. 592. 1 Lord Raym. 441. by the delegates, among whom was Lord Chief Justice Treby.

(2) It appears that the rule under consideration was borrowed from the civil law, and incorporated into our law, with some hesi-

Origin and gradual a-

Lord Mansfield's doctrine in respect to the admissibility of extrinsic evidence to rebut the presumption.

The general rule was admitted in *Brady*, lessee of *Norris v. Cubitt*<sup>c</sup>, the Chief Justice at the same time observing that in his recollection there was no case in which marriage, and the birth of a child, had been held to raise an implied revocation, where there had not been a disposition of the whole estate (3). In the last-mentioned case, Lord Mansfield expressed great doubt whether the circumstances of the case were such as would raise the presumption, the testator having, in contemplation of his marriage, settled 800*l.* a year upon his intended wife; so that he not only contemplated the change in his situation to take

<sup>c</sup> Dougl. 31.

adoption of the rule.

tation, and by very gradual adoption. Lord Kenyon has remarked that a very able lawyer, Mr. Justice Perrott, dissented from the decision in *Christopher v. Christopher*, lest the statute of frauds should be thereby repealed, and having a jealousy of introducing the civil law, he resisted the force of those arguments which found their way to the other Judges who determined that case. But his Lordship added, he was glad those Judges did over-rule his opinion, because no person could wish that his family should be put into such a situation as to be deprived of all provision, and that the secondary objects of his bounty should be preferred to his immediate children. 5 T. R. 58.

Whether the previous disposition of the whole estate is necessary to ground the application of the rule.

(3) Lord Mansfield's doctrine does not appear to have been acted upon, and yet many difficulties must follow a different construction of the rule, for if it is applicable to cases, where the marriage and birth of a child were not preceded by a total disposition, it must either depend upon a fluctuating consideration of what was enough for the family in each case; or, if every partial disposition, however small, is to be revoked by these events, then it must rest upon this proposition, viz. that every man who marries, and has issue, must necessarily mean all he has in the world to become theirs.

place after his will, but actually provided for it, as to his wife, by his will, and his Lordship appears to have considered the rule as flexible to the particular circumstances of each case, and standing only on a presumption of fact, which, like all other presumptions of the same kind, might be rebutted by every sort of evidence. According to this view of the principle of the rule, the facts of the case were admitted to furnish a counter inference to the presumption of the rule, which was made to give way; and the will was adjudged upon these grounds, to be unrevoked by the subsequent marriage, and birth of a child.

In subsequent cases the rule has been considered as standing upon firmer ground than a mere presumption of fact. In *Doe v. Lancashire*<sup>a</sup>, Lord Kenyon was of opinion that the foundation of the principle was not so much a presumed intention to alter the will, implied from the circumstances afterwards happening, as a tacit condition annexed to the will itself at the time of making it—that the party does not *then* intend that it should take effect if there should be a total change in the situation of his family. And Lord Alvanley, in *Gibbons v. Caunt*<sup>c</sup>, expressed a disapprobation of the practice of receiving parol evidence to rebut the presumption, which he seemed to think should be considered as inevitably arising from the subsequent marriage and birth of a child.

The principle of the rule according to Lord Kenyon.

The decision in *Christopher v. Christopher*, went

<sup>a</sup> 5 T. R. 49.

<sup>c</sup> 4 Vez. Jun. 848.

a little beyond former cases, not only in carrying the rule to *real estate*, but in applying it also to the case of a second marriage with children, where there were no children of the first marriage.

Whether a will is revoked by the birth of more children by a first marriage after the will, and a second marriage without children.

By the case of *Gibbons v. Caunt*<sup>†</sup>, it was left a question, and so it still remains, whether, if a testator has more children by a first marriage born after the date of the will, and becoming a widower marries again, and has no child by the second wife, the will is revoked. Lord Alvanley, however, observed that there was not a single argument applying to the feelings of mankind, that did not apply as much in the case before him as in the simple one of a subsequent marriage, and the birth of a child.

It was held, however, in the well considered case *ex parte the Earl of Ilchester*<sup>‡</sup>, that a second marriage and the birth of children, *where the wife and children were provided for by settlement*, and there were children by the former marriage, which was before the will, was a case of exception to the rule in question; and the will in that case was held not revoked. And this decision appears to strengthen what was observed by Lord Mansfield, in *Brady v. Cubitt*, on the testator's having in his contemplation, at the time of making his will, the provision for his intended marriage; and seems to favour the doctrine of founding the principle of these cases rather upon presumption from intention, than a fixed and permanent rule of law.

The Lord Chancellor, in the case last adverted

<sup>†</sup> 4 Vez. Jun. 340.

<sup>‡</sup> 7 Vez. Jun. 348.

to, disclaimed the adoption of any general principle, and professedly decided the case before him upon its own particular circumstances. He thought it better to express his opinion in terms of exclusive applicability to the case, by declaring that under all the circumstances belonging to it, he thought that the appointment was not revoked by the subsequent marriage, and birth of children.

The case of *Doe v. Lancashire*<sup>b</sup>, was that of a subsequent marriage, and the birth of a posthumous child; and, the point there was, whether the circumstance of the child's being born after the death of the testator, took it out of the rule that marriage and the birth of a child are a revocation of a will. The argument principally relied on against the revocation was this, viz. that at the death of the testator, and before the birth of the child, one of the circumstances which composed a case falling directly within the rule was wanting; and the decision respecting the validity of the will, ought then to be made, as if the question had arisen during the interval between the death of the testator and the birth of his child; for the will could not be valid at the testator's death, and rendered invalid by subsequent extrinsic circumstances. Suppose the child had never been born alive, and the marriage and pregnancy had been held to be an implied revocation, all the devises in the will would then have been revoked in favour of a person who never came into esse. The greatest presumption that could be raised from the wife's pregnancy would be an intention to revoke when

A subsequent marriage and the birth of a posthumous child operate as a revocation.



the child should be born; but a declaration of an intention to revoke a will at a future time was not sufficient even before the statute of frauds; it must be a present purpose<sup>1</sup>.

But this reasoning was met by Lord Kenyon's exposition of the principle of the rule, viz. that it does not so much depend upon the presumption of intention, as on the notion of a tacit condition (4) annexed by legal construction to the will, that in such an event the will should not stand. In support of the decision may be added also the fiction of law, that the instant the child is born, he is considered by *retrospect* as born during the parent's life; which doctrine is referrible to the civil law from which the rule itself was originally borrowed, and from which it may therefore with propriety receive its explanation (5).

<sup>1</sup> Cranwell v. Saunders, Cro. Jac. 497.

(4) A man may make a conditional or contingent will; as where a testator on the eve of going abroad says, "In case I die before I return, I bequeath so and so," the will is avoided by his return. Ambl. 557. *Parsons v. Lanoe*.

(5) Vinn. lib. 2. tit. 13. The will is good until the child is born, *quam diu quis in utero est, proprie nondum homo vel animal est*. But the moment he is born *testamentum rumpit*; *tunc enim fictione juris, nativitas retrotrahitur*. See also what his Lordship observes as to the notice which is taken by *our* law of posthumous children; as where a father dies leaving a daughter, and his wife ensient, and a son is afterwards born, though the lands descend to the daughter in the interim, yet the instant the son is born the descent shifts to him. See Co. Litt. 11. 6. His Lordship added, that under the statute 10 and 11 W. 3. c. 16. the law considered posthumous children as entitled to take, but the misfortune was that if there were no trustees to preserve contingent remainders, that which was good in its inception, might be afterwards de-

Statute 10 and 11 W. 3. c. 16. concerning children in ventre sa mere.

Mr. Justice Grose forcibly observed, that he knew of no argument founded on law and natural justice, in favour of the child who is born in his father's lifetime, that did not equally extend to a posthumous child. And Mr. Justice Buller relied on the cases in our own law, which have decided that a posthumous child is to be considered as in the same situation as one born during the parent's life. He said that all the cases cited by the counsel for the plaintiff as well as that of *White v. Barber* (6), established the point

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feated by the child's not being in esse when the particular estate dropped; but that was founded on technical reasoning, because the particular estate failed before the remainder could take effect. See the note by Mr. Serjeant Williams, to *Purefoy v. Rogers*, Saund. 387. n. 7.

(6) 5 Burr. 2708. *Doe v. Clark*, 2 H. Bl. 399. It seems, therefore, to be well established that under a devise to children living at the testator's death, a child in ventre sa mere shall take. *Hale v. Hale*, Prec. in Ch. 50. *Beale v. Beale*, 1 P. Wms. 245. *Miller v. Turner*, 1 Vez. 85. *Clarke v. Blake*, 2 Bro. C. C. 320. Though there are some cases to the contrary: *Pierson v. Garnett*, 2 Bro. C. C. 38. *Cooper v. Forbes*, 2 Bro. C. C. 63. If one devises, in case he leaves no son at the time of his death, to J. S. and dies leaving his wife privement ensient with a son, this posthumous son is a son living at the testator's death, and J. S. is consequently not entitled. See *Sir Rob. Burdett v. Hopegood*, 1 P. Wms. 485. So a posthumous child takes under the statute of distributions, 2 P. Wms. 446. *Wallis v. Hodson*, 2 Atk. 117. Thus also if a power be created for charging lands for portions for younger children living at the father's death, a child in ventre sa mere is a child within the power. *Beale v. Beale*, 1 P. Wms. 244. It is said also that a posthumous child may be vouched, Co. Litt. 390. If the mother takes poison with intent to poison it, and the child is born alive, and afterwards dies of the poison, it is murder by the common law. 3 Inst. 50, 51. As to the intermediate profits, *Lord Hardwicke*, in the case of *Bassett v. Bassett*, 3 Atk. 203. held, that a posthumous son, claiming under a remainder in a set-

that there was no distinction between a child in ventre sa mere, and one actually born. He would add, he said, one to them from 1 Vez. 85. where in a bond given on marriage to raise 2000*l.* for such child or children of the marriage, *as should be living* at the death of the father or mother, a posthumous child was held intitled to take as coming within the description. Upon these reasons the court gave judgment for the revocation (7).

Marriage  
and the  
birth of a  
child must  
concur,  
and both  
events

It seems, therefore, upon the above-mentioned cases to be well settled that marriage, and the birth of a child, are by operation of law a revocation of a preceding will. And it appears to be with equal cer-

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tlement, was by construction of the 10 and 11 W. 3. c. 16. entitled to them: but in the same case he seems to have taken it for granted that on a descent the mean profits belong to the intermediate possessor; for he directed that the profits of the estate descended should be accounted for by the uncle, only from the birth of the posthumous child. In Co. Litt. page 55, b. Lord Coke says, "If a man seised of lands in fee hath issue a daughter, and dieth, his wife being ensient with a son, the daughter soweth the ground, the son is born, yet the daughter shall have the corn, because her estate is lawful, and defeated by the act of God." From which it is to be inferred that Lord Coke did not consider the posthumous child as entitled to any mean profits upon a *descent*. And Lord C. J. De Grey, in 2 Wils. 526. on a question whether a posthumous son was actually seised, denies that the posthumous son, in the case of descent, can be entitled to any profits received before his birth, and cites 9 H. 6, 25. as an authority in point. See Mr. Hargrave's note to Co. Lit. p. 11, b.

(7) The Court agreed in disclaiming any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the statute of frauds, which was passed in order to prevent any thing from depending either on the mistake or the perjury of witnesses.

tainty settled that both these circumstances must happen to produce such a consequence. In *Ward v. Phillips*, a will was found which gave every thing to the widow. A posthumous child being born, a suit was instituted in the Ecclesiastical Court to set aside the will; and the court having decreed against the will, that decree, on appeal to the delegates, was reversed. Dr. Hay, in commenting upon the case observes, that on the side of the first decree it was objected by Dr. Calvert, that as marriage alone did not revoke a bachelor's will, but required the additional consideration of the birth of a child, the birth of a child or children was to be taken as the essential and operative circumstance, and ought to revoke a married man's will; and for this construction he relied on the case of *Jackson v. Hurlock*, before Lord Northington; but that case went no further than to recognize the rule, that marriage without issue did not revoke a will, which rule, said Dr. Hay, was before established by many cases; but it by no means followed from thence that the birth of children would affect a married man's will.

must take place after the will to produce a revocation,

It was further objected, continued the learned Doctor, that in the Roman law, by which we proceed in this court, the birth of children operated as a revocation of a precedent will. This is rightly stated from the Roman law; and it is true that the Roman law in general guides our decrees; but it guides our decrees no further than where it stands contradicted by the English law. In the former, children are considered as having a property in the effects of the father; but in our law we know of no such thing.

and therefore the effect of the birth of children must be very different (8).

In *Shepherd v. Shepherd*, the case was thus : Shepherd, the testator, after some small legacies to his collateral relations, made his wife his residuary legatee. After this will, his wife was brought to bed of a daughter in 1763, upon whose birth the testator added a codicil to his will, whereby he directed that the legacies should be paid, and that an annuity of 300*l.* should be secured upon the residuum, and paid to the daughter. The codicil and will were found together. In 1765 another daughter was born ; and in 1768 a son, who was a posthumous child, the testator having died about six months before his birth. These two last children being unprovided for, a suit was commenced in equity, to set aside the will, and to decree an intestacy. And the question on the case sent out of Chancery by Lord Camden, for the opinion of Sir George Hay, Judge of the Prerogative Court, was, whether the subsequent birth of children was a revocation of the will. That learned civilian, after stating it to be an incontrovertible position settled by an abundance of cases, that marriage alone will not revoke, held that so the birth of children alone would not, unless under very special circumstances ; and accordingly decreed the probate to the executor.

Upon the whole, therefore, it appears that the doctrine as expressly laid down in *Lugg v. Lugg*, before

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(8) See Dr. Hay's judgment in *Shepherd v. Shepherd*, 5 T. R. 51, in note.

mentioned as the first of this class of cases, viz. that where the revocation depends upon the alteration in the testator's circumstances, it must be a *total* alteration, has prevailed through all the subsequent cases. And that *total* alteration is made to consist in the combination of the two facts' of marriage and the birth of a child or children.

But Dr. Hay, in the above-mentioned case seemed also to think that there might be such a *total ignorance* in a testator of his real situation as might occasion some doubt; according to the case put by Cicero, in his *De Oratore*, and which has before been mentioned as applicable to our law on the same subject: *Pater credens filium suum esse mortuum, alterum instituit hæredem, filio domo redeunte, hujus institutionis vis est nulla.* But it has also been before observed that by the Roman law the children were considered as having a sort of inchoate property in the effects of the parent. Unless the testator shews by the context or expression of his will the existence of such total mistake or ignorance, or professedly grounds his testamentary disposition upon facts which he can be shewn to have mistaken, it should seem very strong to say, since the statute of frauds and perjuries, that any extrinsic evidence can be admitted to prove the intentions of the testator for the purpose of *overthrowing* his will (9). Where the will itself

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(9) The inquisitive reader will find the subject of the admissibility of extrinsic evidence to controul or explain written instruments treated of much at length in the introductory chapter to the treatise on the statute of frauds. And particularly as to the relief against mistakes, in Sect. 4 of Chapter I.

coupled with the facts shews the mistaken apprehension on which the devise has been grounded, the case falls within the principle of *Campbell v. French*, already cited<sup>k</sup>. And to a case so circumstanced perhaps the principle on which Lord Kenyon seemed in great part to ground his opinion in *Doe v. Lancashire*, may seem to apply; for there appears to be a sort of tacit condition annexed to, or accompanying, in legal consideration, such a devise, that if the facts were otherwise than apprehended by the testator, the devise should not stand.

This presumption of revocation may give way to circumstances.

In a case where, after a man had made his will whereby he had bequeathed several legacies and appointed his wife residuary legatee, the wife died leaving several children, and the testator married again and had one child by his second wife, and afterwards perished by shipwreck together with his wife and all his children, it was decided by Sir W. Wynne, the judge of the prerogative court, that the will was not revoked.

As the circumstances of this case were peculiar, and many important principles occur in the argument, it shall be presented fully to the reader (10).

George Netherwood shortly after his marriage with

<sup>k</sup> 3 Vez. Jun. 321.

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(10) A correct note is given of the case of *Wright v. Netherwood*, in Mr. Evans's very valuable edition of Salkeld's Reports; to which note the Author is principally indebted for the above statement, though he has a pretty full one in MSS. in his own possession, with the addition of many learned opinions.

his first wife Elizabeth Lomax, made a will whereby, after charging his real estate with the payment of his debts and legacies, if his personal estate should be deficient, he gave some pecuniary and specific legacies, and bequeathed the residue of his personal estate to his wife. He also devised his real estate to his wife for life, with remainder to one George Netherwood, and appointed an executor for his effects in England, and another executor for his effects in the West Indies. His wife died leaving several children; the testator married her sister and had issue by her, one son. He afterwards embarked for England from Jamaica, with his second wife, her son, and all the children by the former marriage. The ship in which they embarked was never afterwards heard of, and was admitted to be lost.

The will was proved by the executor in England, and by the inventory of the property belonging to the deceased it appeared to amount to about 8000*l.*, the legacies amounted to rather more than 200*l.*

The executor who proved the will was afterwards cited by the next of kin to prove it in solemn form, or to shew cause why it should not be declared invalid.

Sir William Scott and Doctor Nicholl on this occasion argued in support of the will. They contended that in this case it was not revoked by the second marriage and birth of a child. That although it might be admitted as a general principle that these events did revoke a will on the presumption that upon such a total alteration of his situation the testator did not continue to have the same intention, yet that such pre-



sumption was liable to be repelled by circumstances; and that if it appeared to be his intention that the will should stand, marriage and the birth of a child would not destroy it. They observed that all presumptive revocations were *stricti juris*, and must be wholly inconsistent with the deceased's intention to dispose of his property according to his will. That the general principle of these revocations is, that where a person has contracted such new obligations and relations, it could not be supposed he meant to adhere to his former disposition: that this principle was recognized by all the cases upon the subject, and that they all proceeded upon the ground of a *total alteration* in the testator's circumstances: but that if there were not a total alteration, the implication was repelled.

No case, they said, could be stronger against a revocation than this. When the deceased was married he made a will by which he bequeathed some small legacies, and disposed of the rest to his wife. This, they observed, might have been in confidence that she would take care of any children he should have by her. By the death of the wife the residue became lapsed. And on his second marriage his fortune would have taken the same course in point of substance as if he had made no will. The few legacies would have belonged to the persons to whom they were given, and the residue would have been the subject of the statute of distributions.

They mentioned cases in which it had been held that this alteration in circumstances did not amount to a revocation, as, where the will was not of such a description as to make the court say the testator could not

in duty adhere to the disposition which he had made. Such was the case of *Brown v. Thompson*<sup>1</sup>, where it was held that the alteration in circumstances was not sufficient to amount to a revocation, for no injury was done to any person, and those whom the testator was bound to provide for were taken care of. That case they contended was the same as the one in question; the great bulk would go to the wife and children, all the new relations were fully satisfied, and there was no probability of the testator's not intending to adhere to his former disposition. In *Brady v. Cubitt*<sup>m</sup>, it was said by Lord Mansfield, "that upon his recollection there was no case in which marriage and the birth of a child had been held to raise an implied revocation where there had not been a disposition of the whole estate." This they contended, although it might not be essential, was certainly very material. Presumed revocations might exist where the residue was very small, but it was otherwise where a small part only was disposed of, and the bulk remained. In *Thompson v. Shepherd*, mentioned in a note to *Ambler*<sup>n</sup>, it was held that marriage and having children did not amount to a revocation of a will made by a widower who had children. It was not that complete alteration of circumstances which implied the revocation of a declared intention. A case of *Calder v. Calder*, lately decided in the prerogative court, they said, did not apply, as it depended upon its own circumstances, and there was no ground to presume that the testator adhered to his intention. That was the case of a will made by a widower having no children, and which had no view to the relations of husband and father. The great bulk

<sup>1</sup> 1 Eq. Ca. ab. 413.<sup>m</sup> Dougl. 31.<sup>n</sup> 490.

of his property was left away, and there were declarations shewing his idea that his property would go to his wife and children upon a marriage subsequent to the will ; and the will itself was such as would have involved the family in endless litigation. Every circumstance in that case raised the implication that the will should be revoked ; but no such circumstances existed in the case under consideration ; on the contrary, every circumstance repelled the implication. They further urged that there would have been a very considerable provision for the wife and her child ; and that it must be presumed the testator knew the operation of the will ; that it disposed of the small legacies according to his intention ; that the residue would be distributable according to law ; and that his property would be managed by the respective persons in whom he had reposed a confidence for the purpose.

Upon another part of the case, viz. whether, supposing the will revoked, it was restored by the presumable survivorship of the father, the advocates before-mentioned observed that, in cases where the parent and son perished by the same stroke of death, and it could not be ascertained which was the survivor, the Roman law presumed, with certain exceptions, that if the son had not attained the age of puberty, the father survived ; but if the son had attained that age, that he survived the father. This presumption, they said, arose from the degree of strength supposed to belong to the respective parties. Applying this general rule of presumption to the present case, they contended that the child by the second wife, being only about a year old, must be taken to have died before the father.

They further stated that, by the Roman law, a will revoked by the birth of a posthumous child did not revive by his death, because no change in the father's intention could in that case be presumed; but that it was held otherwise with respect to the quasi posthumi, or those who were born after the will in the testator's life-time, on whose death the will was restored by the Prætorian law, as upon a new designation of intention. That there was no case where it had been held by the English law, that under these circumstances a presumptive revocation did take place. That the presumption of the law of England, with respect to revocations, was not more strong than the agnatio sui hæredis, by the civil law, nor so strong, for that was an actual revocation, and the other only a presumption liable to be repelled. That by the Prætorian law it was held that upon the death of the agnatus the will was restored; and that the removal of the cause in the present case would as strongly imply a renewal of the first intention, or rather more strongly, on account of the omission to destroy the will.

And lastly, it was said, that, at all events, the testator intended the legacies, on account of which alone the dispute was material, should be carried into effect; and that the executors whom he had appointed should have the management of the property; so that if the court upon a presumed intent, decided against the will, the actual intention of the testator would be defeated.

Doctor Battine and Doctor Swabey on behalf of the next of kin insisted on the general rule that a will

is revoked by marriage, and the birth of a child. They contended that the change in the testator's situation, from being a widower to becoming again a husband and a father, was such a total change as to raise the presumption that he did not intend the will to stand. That it had been decided by Sir George Hay that the cases of widower and bachelor were the same. That there was no decision that the quantity of property would vary the presumption.

With respect to the case of *Brown v. Thompson*, they observed, that it came on first before Sir John Trevor, Master of the Rolls, who held that the will was revoked: that the different opinion afterwards given by Lord Keeper Wright was on account of the particular circumstances of the case; and that Mr. Justice Buller, in *Doe v. Lancashire*, thought the opinion of the Master of the Rolls better than that of the Lord Keeper. They admitted that there was a *dictum* of Lord Mansfield in the case of *Brady v. Cubitt*, that a will was not revoked by marriage and the birth of a child if it only covered part of the property, but they observed that it was a *dictum only*. That in *Doe v. Lancashire* the revocation was held to arise from a tacit condition at the time of making the will; and that although there might be some cases in which a will was allowed to stand from circumstances repelling the presumption, yet nothing was more dangerous than to let a particular equity arising from the quantity of the effects operate against a general rule of law, as it would introduce a vague and uncertain method of decision, and it was better to adhere to a known presumption of law. In this case, they said the disposition was complete by the

will, both as to the real and personal estate, and the testator had not shewn, since the alteration in his circumstances, any disposition to adhere to it. And that though the real estate was not within the jurisdiction of that court, the fact of its being wholly devised away might afford an argument in favour of the revocation.

As to the other point, they contended that it was not to be taken for granted in this case, even according to the principles of the Roman law, that the child died first. That the doctrine alluded to went no further than to shew that, when a father and son perish by the same stroke of death, the father is supposed to survive his infant son. But that it did not appear that in this case they perished by the same stroke of death. The ship being cast away was all that was admitted, and non constitit that they died by shipwreck. They insisted that the general law being that the will was revoked, to take the case out of that law, the revival of the will by the father's surviving must be shewn by the other side. That, by the Roman law, if a will was void for the pretermission of a child who afterwards died, the will was not thereby rendered valid, or if it was revoked by the birth of a posthumous child, the death of that child did not restore it; and that, in case of a will becoming void by any subsequent cause, the removal of that cause did not restore it by the civil law; though it was otherwise by the Prætorian law, which was in the nature of a court of equity, and only prevailed for the sake of the hæres scriptus, or residuary legatee. That in this case the residuary legatee being dead, the ground on which the jus prætorium interposed failed. That

any particular legatee had the advantage of its revival *incidentally*, as it was allowed to stand on account of the general hæres scriptus. They also contended that, even supposing this case were to be decided by the Roman law, and the will were to be restored by the survivorship, it could not be restored in the present instance, for no alteration in the father's intention could be presumed to have taken place after the son's death; and it was only upon such presumption that after an agnatio sui hæredis the will was by the prætorian law restored. That if the father did survive a few minutes, there was no room to suppose he had time to change his intention. But they observed that the doctrine of revival was no part of the civil law which had been adopted by the law of England. They adverted to a case of *Barrow v. Baxter*, which had been decided in that court, and was mentioned in *Ambler*, 491. in which case, it appeared from the register that the wife brought no fortune and had a settlement, and that there was a child who died before the testator, and yet the will was held to be revoked. As a matter of general learning, they further observed that the Roman law was not adopted in these cases by the law of England, for they essentially differed from each other in many respects.

The learned advocates on the other side, in reply to these arguments, contended that the civil law, upon the grounds which had been already argued, was clearly in favour of the will. That the court would not attend to distinctions between *jus prætorium* and *jus civile*. That *jus prætorium* was just as much a part of the general system as any other; and that, in fact, it was the predominating and over-ruling authority. As to the case of *Barrow v. Baxter* they said it was

certainly contrary to the civil law, and that it did not appear that those points were adduced which in this cause had been urged in support of the will. With regard to the distinction which had been made between the hæres scriptus and a special legatee, they observed that the latter was as much intended to be benefited as the former. That it being the established law that the death of the quasi posthumi revived the will, the distance of the interval between his death and that of the testator was not material against the presumption of law ; and that the court was not to examine by evidence whether there was an actual change of intention or not.

They contended that the law with respect to revocations by marriage and the birth of a child, was, as laid down in *Brady v. Cubitt*, a mere principle of presumption. That in such a case all the circumstances were to be taken together, and that the state of the property might be very material. That it was extraordinary that if there were any decision that a paper disposing of small legacies would be revoked by subsequent marriage and birth of a child, that no such decision should appear. That though the courts had not gone the length of Lord Mansfield in *Brady v. Cubitt*, by deciding that a revocation did not take place if any property were left, yet that there was no case where marriage and the birth of a child had been held to amount to a revocation where the will was such as might have been made, after these relations were contracted, fairly and without injury to the family. The disposition in the will in question, they said, extended only to a small property and might have been fairly made by a person having a family, the lapsed residuary bequest being as if it had never



existed, and they contended that, the testator having no wife or children at his death, the tacit condition (which in *Doe v. Lancashire* was considered as the principle of those cases) might be fairly considered as a condition that the will should not take effect if the testator should afterwards have a wife and children *who survived him*.

It was further urged by the same advocates, that all the cases in the courts of common law admitted that the doctrine upon that subject was borrowed from the civil law. That the courts had not adopted all the minute rules and distinctions of that law, but only some of its general principles : and that there was no principle better founded on justice than that, if a will was revoked by the birth of a child, it was revived by his death in the life-time of the testator.

Sir William Wynne, in delivering the judgment of the court, observed, it was clearly the general law that by marriage and the birth of a child the will became void by implication of law. That he thought it was a mistaken notion that there was any such distinction as that mentioned by Ambler°. That the principle of the rule was, that the change of circumstances founded a presumption that there was a change of intention which might be as strong in favour of in a second wife and family as a first, and that it did not seem material whether the will was made by a widower having children, or by a bachelor. He said that the more weighty argument was drawn from the operation of the will under the circumstances which had happened. That the testator had given legacies

° 490. in margin. See ante, 361.

which were not very considerable, and the rest to his wife. That the gift of the residue became void by her death, so that if he had left a second wife and son they would have had their share with the other children. That in *Brady v. Cubitt* it was said by Lord Mansfield that there was no case of a revocation where there was not a total disposition ; intimating that the ground of revocation was an entire deprivation ; but that, however that might be, if there was an ample portion remaining, after a few legacies to friends, there was no decision that a will would be revoked, and that the principles on which the cases had gone, did not militate against such a will. This case, however, he said was not exactly similar. The testator gave the bulk of his property to his wife early after marriage. She lived for several years, during which they had several children born. The birth of those children would not have revoked the will, and he might have meant to leave them in the power of their mother. She died, and it was not an improbable supposition, that he, knowing the effect of the will, suffered it to remain. There was a strong ground then to contend that under those circumstances the case did not fall within the rule laid down and established for the revocation of wills.

The learned Judge said, he was not aware of the case of *Barrow v. Baxter*, in which the court seemed to think the subsequent death of the child would not make an alteration ; but he said the point seemed very much like that which had been a *vexata questio* in those courts, and brought before the courts of common law, whether a will which was revoked by another is set up by the destruction of the second. That there was a case to that effect before Sir George Lee, of

*Hellyer v. Hellyer*, in which it was held that the will being once revoked, remained so, but that there was an appeal from that judgment to the delegates, which was never determined by them; and that the case of *Glazier v. Glazier*<sup>p</sup>, was directly contrary to that, it having been there held that the first will was good. That in *Brady v. Cubitt* it was laid down by Buller J. that implied revocations must depend on the circumstances at the time of the testator's death, and that made it material to enquire what those circumstances were. That the fact was, that having embarked they all perished. The Roman law he said, had been entered into, and it clearly appeared by the Prætorian, which was considered as the latter Roman law, that the revocation was entire and not presumptive; and yet the will was held to revive. With respect to the priority of death, he stated that it always had appeared to him more fair and reasonable in those unhappy cases, to consider all the parties as dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of the degrees of robustness. Then the testator at the time of his death had neither wife nor children, and Buller J. said it was to depend upon the circumstances at the time of the testator's death; and there was no circumstance to raise a presumption that he intended at that time that the will should be revoked.

On the first point, the learned Judge declared he should have great doubt whether the presumed revocation did take place at all.

As to the second, as there were neither wife nor

children at the death of the testator, he was clearly of opinion that the court ought to pronounce for the validity of the will.

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## SECTION XVIII.

### *Effect of a woman's marriage upon her will.*

ALTHOUGH marriage, and the birth of a child, must both happen to revoke the will of a man, yet it has been settled that a woman's marriage alone will be a revocation or rather countermand of her will, if she dies in her husband's life-time (1). This was so determined in the case of *Forse v. Hembling*, in *Coke's Reports*<sup>a</sup>. It was objected that, although after the marriage, the wife could not revoke her will, yet that that was no reason why the marriage should be a countermand: for, that if a man of sound memory made his will<sup>b</sup> and afterwards became non compos mentis, he could not countermand his will, and yet such his disability was no countermand.

The marriage of a woman after making her will is alone enough to revoke it, without the birth of a child.

<sup>a</sup> 4 Rep. 61. a.

<sup>b</sup> 1 And. 181. Godsb. 109.

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(1) If a feme sole surrenders to the use of her will, and marries; her marriage is a revocation, or at least a suspension of the surrender. Ambler, 627.

But the court were unanimous that the marriage and coverture at the time of the death, was a countermand, and that for several reasons. 1st. The making of a will is but the inception of it, and it does not take effect till the death of the devisor; but it would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it; and therefore the taking of a husband, shall amount to a countermand at law.

But when a man of sound memory makes his will, and afterwards by the visitation of God, becomes of unsound memory, (as every man for the most part before his death is), it would be hard, indeed, if this act of God should be a revocation. 2dly, It would be mischievous to women, if their wills, after their marriage, were to stand irrevocable. And this they must be, unless the marriage were a revocation, for the law will neither allow a will to be made or revoked by a feme covert, because both might then be done by the constraint and coercion of the husband.

Whether, if she becomes discover again, and dies a widow, the will is revived?

It was said by Manwood, in Plowden's Commentaries<sup>c</sup>, that if a feme sole makes her will the 1st day of May, and gives land thereby, and afterwards on the 10th day of May she takes husband, who dies on the 20th day of May, and the woman dies on the 30th, the devise is good; for it could not take effect until her death, at which time she was discover, as she was at the time of making her will; and the intermarriage should not countermand that which was of no effect in the life-time of the husband. Which proposition was not denied. And it is observable that in the

<sup>c</sup> Plowd. 343.

above-mentioned case of *Forse v. Hembling*, where this position of Serjeant Manwood is cited, no disapprobation of it was intimated by the court; and the judgment in that case is expressly grounded not only on the marriage of the testatrix, but also on the circumstance of her dying covert baron. Though in *Cotter v. Layer*<sup>d</sup>, it was said by Lord Chancellor King, without any qualification, that a woman's marriage alone was a revocation of her will, yet that opinion being grounded entirely on *Forse v. Hembling*, does not carry the doctrine further.

It seems to have been held, however, in *Mrs. Lewis's case*<sup>e</sup>, that a will made by a woman before marriage is so totally revoked by her marriage that it cannot revive on the subsequent death of her husband. And it is to be observed, that though in *Doe v. Staple*<sup>f</sup>, none of the Judges pronounced a decided opinion on the point whether a will by a feme sole, revoked by her subsequent marriage, would have its validity restored to it by the wife's surviving her husband, yet the language used by Lord Kenyon, is rather on the negative side; for his Lordship's words are, that "the will of a woman made before coverture ceases to be her will afterwards; because it is of the essence of a will that it should be valid *during the remainder of the testator's life*. Therefore, generally speaking, the will of a woman ceases to have any operation after she becomes covert." That learned Judge does not say "during coverture," nor does he add, "if she dies during coverture;" but his words express the proposition in as unqualified a sense as those

<sup>d</sup> 2 P. Wms. 524. see also 2 Bl. Comm. 499.

<sup>e</sup> 4 Burn. Eccl. Law, C. 47.

<sup>f</sup> 2 T. R. 684.

of Lord Chancellor King. And, in the reason which he gives for the revocation is comprehended a negation of any such revival of the will by the death of the husband; for if it be of the essence of the instrument that it should be always valid, (and it is not valid during the coverture, as has been before shewn, because not revocable) then it should seem to follow as a clear consequence, that what destroys the essence must be a total destruction of the thing itself, so as to leave it no potential existence.

The counsel in *Mrs. Lewis's* case, which was before the delegates, cited many authorities from the civil law to shew, that among the Romans, if a man made his will, and was afterwards taken captive, such will revived and became again in force, by the testator's repossessing his liberty. But this was answered by adverting to the difference between a voluntary act, and an act of compulsion. And the will was adjudged not to be good. So that the weight of authority, and perhaps of principle, seems to be against holding the will of the feme sole, revoked by her subsequent marriage, to be restored to its operation by the wife's surviving her husband.

A married woman may execute a power given to her while sole to be exercised during marriage.

It has been sometimes considered doubtful whether a power given to a feme sole was not suspended by her marriage<sup>s</sup>; but the law seems now to be understood as settled, that a feme covert may execute a power given to her while sole. However, where an agreement before marriage was entered into, that a settlement should be made of the wife's estate, reserving to her a power of disposing of it by will; and be-

fore the marriage she devised it in favour of the intended husband, who survived her, the will was nevertheless held to be revoked. For the agreement was for an authority to be exercised during the marriage, and therefore could have no operation in preventing the consequence of law, with respect to what was done before the marriage<sup>a</sup>.

And if it is exercised before marriage, it will be revoked by the marriage.

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## SECTION XIX.

### *Of the revocation of wills of personal Estate.*

A REMARKABLE case which happened in Lord Nottingham's time is said to have given rise to the clause in the statute for invalidating unwritten revocations of wills of personal estate.

Mr. Cole at an advanced age married a young woman who did not conduct herself with propriety. After his death she set up a nuncupative will, said to have been made in extremis, by which the whole estate was given to her in opposition to a written will made three years before the testator's death, giving 3000*l.* to charitable uses. The nuncupation was proved by nine witnesses. Upon the appeal to the delegates from the sentence of the prerogative Court in favour of the written will, Mrs. Cole offered to go to a trial at law in a feigned action, submitting to be

Case said to have given rise to the clause in the statute 29C. 2. c 3. for invalidating unwritten revocations of wills of personal estate.

<sup>a</sup> See *Doe v. Staple*, 2 T. R. 684. and see the same point ruled in Equity, in *Hodgson v. Lloyd*, 2 Bro. C. R. 534.



bound by the result. Upon the trial at the bar of the Court of King's Bench, it appeared that most of the witnesses for the nuncupation were perjured, and that Mrs. Cole was guilty of subornation. She then applied for a commission of review, which was refused; and upon that occasion Lord Nottingham said, "I hope to see, one day, a law that no written will shall be revoked but by writing."

The statute of 29 Car. 2. c. 3. s. 22<sup>b</sup>. is express, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at least (1). These points were in question in the case which took place in the prerogative Court in the will of Mr. Wright, of Chelsea, which some little time ago excited much general attention. Mr. Wright died on the 13th February 1814, having on the 5th of August 1800 made his will appointing Lady Wilson and the Right Honourable Charles Abbott executors, and bequeathing to the former the residue of his property, after payment of his debts and some specific legacies. The allegation offered pleaded that the deceased on the

<sup>a</sup> See *Matthews v. Warner*, 4 Vez. Jun. 196, note (a).

<sup>b</sup> 29 Car. 2. c. 3. s. 22.

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(1) But it is not made necessary that such revocation by parol, when committed to writing, should be signed or attested.

11th of February, two days only before his death, being very ill, addressed himself to two or three persons who were with him, and declared his intention to give a certain sum out of the money which he had invested in the bank to ——. The words used by him on this occasion were reduced into writing on the 15th of March, after his death, and attested by the persons in whose presence they were uttered. The admission of this allegation to proof was opposed on the ground that the statute 29th Car. 2. by the clause above cited, required that no will in writing concerning any personal estate should be repealed, nor any clause, devise or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator and allowed by him, and proved by three witnesses as aforesaid.

From the facts stated in the allegation it appeared that the money in the bank was included in the residuary clause; and the judge observed that it was clear that as the money in the bank was included in the will, the effect of the nuncupative codicil would be to alter the will in that respect. That the act on account of its general objects ought to be strictly construed and enforced. That it was imperative upon the court, and left it no discretion. That as to the case of *Brown v. Manby* in 1770 which had been cited, the words were there pleaded to have been written in the lifetime of the deceased, and with his privity, and therefore it was possible the requisites of the Act might appear on proof to have been complied with, but that in the present case it was clear from the facts pleaded that they were not. The court accordingly pronounced for the will.

But where a man by will in writing devised the residue of his personal estate to his wife, and upon her dying in his life-time made another disposition of the residue by a *nuncupative* codicil, in respect to which the requisites of the Act regarding nuncupative wills were complied with, this was resolved to be good, for by the death of the wife the devise of the residue was totally void, and the codicil was no alteration of the former will, but a new will for the residue <sup>c</sup>.

There must be clear evidence of present intention to effectuate the revocation.

As there must be a manifestation of a clear and serious intention to make an actual disposition for any writing to operate as a testamentary act, so to revoke or alter a prior complete testamentary disposition, at least an equal indication of the disposing mind will be required. And this appears from a case recently decided in the Prerogative Court<sup>d</sup>, which, as it marks with some precision the degree of evidence which that court requires to establish the operative intention, shall be stated fully. The question was, whether certain alterations made in a paper purporting to be instructions for the will of Sir S. S. Bart. after the will prepared from it had been executed, were operative as codicils, or were merely deliberative as to an intended alteration, to be afterwards carried into effect.

It appeared that Sir S. S. had duly made his will on the 2d of March 1810, which was of considerable length, occupying upwards of fifteen sheets of paper, and had therein made an ample and detailed disposal of

<sup>c</sup> 1 Abr. Eq. Ca. 408. and see 4 Burn. Eccl. L. 203.

<sup>d</sup> Sitwell and others, by their Guardian, v. Parker. Prerogative Court, Doctor's Commons, March 11.

his estates and other property. The instructions from which this will was prepared were contained in a paper entitled "Heads or Instructions for the will of Sir S. S." and this paper had been previously left with him for his perusal and approbation; after which it had been returned to his solicitor to prepare the will from, but signed in pencil by the testator, that it might operate in case of accidents in the mean time. It contained, amongst other bequests, one of 2000*l.* to each of the younger children of F. S. Esq. Sir S.'s brother, the eldest being otherwise provided for; but this legacy had been struck through in the instructions, and was therefore omitted in the more formal will, in consequence of Sir S.'s expectations, as explained by him to the solicitor, that the family of Lord C., into which Mr. F. S. had married, would provide for his younger children. After the execution of the will, Sir S. delivered it into the possession of his solicitor, choosing to retain the instructions himself, as containing a more abstracted account of the contents of the will, and therefore more easy of reference than the will itself in its more precise and formal language. Sir S. died on the 11th of July, 1811, and a probate was obtained of his will only; but the paper of instructions being afterwards discovered in his secretary, was found to contain an obliteration of a legacy to Mr. G., the deceased's steward, with a mark in the margin to refer to it, and this endorsement on the outside, "If  
" any legacy includes Mr. G. in this or any other  
" will or codicil, I revoke it.—S. S.—February,  
" 1811." The pencilled obliteration of the legacy of 2000*l.* to each of Mr. F.'s children was also crossed through in ink, as if with an intention of reviving it; and the deceased had on the 29th of March, 1811

preceeding his death, signed his name to each of the sheets except the second, which contained the obliteration of Mr. G.'s legacy. These alterations appeared to have been made since the execution of the will, and Mr. F. S.'s children, acting by their father as their guardian, instituted the present proceeding as the parties interested, calling in the probate of the formal will, and requiring the executors to take a new probate of it jointly with the paper of instructions, as containing together the will of the deceased.

The evidence in the case fully established the circumstances stated, and also that the deceased, after the execution of the will, had reason to believe that the C. family, with whom the children then were, would not provide for them as he had expected. This idea was subsequently confirmed by an intimation which was received from a distinguished member of the family ; and the deceased in consequence often expressed to those in his confidence, that he supposed he must himself provide for the children, or they would come to distress ; and for this reason he discontinued the advances of money which he occasionally made to his brother, and apprised him of his intention of providing for his children instead. He was also proved to have declared that he should see his attorney at ——— races, and should there make an alteration in his will, but he died before that happened.

Under these circumstances it was contended, on the part of the children, that the deceased, by striking out the former obliteration of their legacy, and signing every sheet of the paper except the one con-

taining the obliterated legacy to his steward, clearly meant to revive the bequest pursuant to his declared intention of providing for them; and that he was only prevented from giving more complete effect to that intention by his death, before he again saw his attorney, as was expected.

Sir John Nicholl, after stating the facts of the case, observed, that the presumptions were strong against the paper, as it had been superseded by the execution of a more formal instrument; and the alterations themselves, relied upon in argument as tending to revive it, were very equivocal. It was possible that they might have been intended as operative, but it was equally so that they might be deliberative only: neither point could to a certainty be ascertained from the present evidence, but it was merely matter of conjecture; and the court could not, upon conjecture alone, pronounce for the alterations in the paper as being intended by the deceased to have operation. He then entered into an examination of the circumstances tending to shew *quo animo* the alterations were made; and inclined to think that they were merely deliberative as to an intended future alteration in his will. The revocation of the steward's legacy, he observed in particular, was expressed not only by striking it through, but also by an endorsement of words, declaratory of his intention in so doing; and it was therefore to be supposed, if he really entertained the same final intention with respect to the revival of the children's legacy, that he would have signified it in a similar manner. What the deceased's intentions really were, it was impossible now to ascertain; he might have formed them, and even proposed to himself the time and manner of giving them effect, and the court could only lament

that he had not made them more apparent; for with all the commiseration naturally inspired by the situation of the children, it could not, consistently with its ordinary rules of decision, pronounce for the alterations in this paper, when the intention with which they were made was not proved to the extent required by those rules. He therefore felt himself bound, though very reluctantly, to pronounce against the paper in question, but directed the costs to be paid out of the estate.

Shortly after the above case, another on the same question was determined in the same court, and by the same judge, which may be useful in helping the judgment in questions respecting the effect of alterations of solemn wills. The case was that of *Dickinson v. Dickinson* and others, in which the question was, whether certain alterations in the will of W. D. deceased, were made by the testator, or by his directions, with an intention that they should have legal operation, or were merely deliberative as to some future testamentary disposition, intended to be made by him.

Alterations  
in pencil  
effectual,  
there being  
sufficient  
proof of a  
dispositive  
intention.

The will was duly executed by the testator in the presence of three witnesses, whose signatures were added. The testator gave an annuity of 60*l.* to the testator's wife for life, and his freehold property to his two sons, with some pecuniary legacies. The alterations were made in *pencil*, and consisted in striking out the wife's annuity of 60*l.* and substituting in the place of it 160*l.* A line was also drawn through the devise of the freehold property to the sons, and some other of the legacies were altered. The will, thus altered, was enclosed in an envelope, on which was also written in pencil, "to my wife

160*l.* per annum as long as she continues my widow." The sons were dead at the time of the alteration. The judge observed that the alterations were not invalid on account of their being written in pencil. They appeared to have been very deliberately made; the figures inserted were also carried out into the margin, and the pencil writing on the envelope seemed to confirm the alterations made in the enclosed. The papers were deposited in an iron chest by the testator, and not kept for revision and completion. The death was not sudden: the testator had ample time to make another will, if he had so intended. Under these circumstances, the court felt itself called upon to pronounce for the operative effect of the alterations.

Implied revocations of wills, and testaments of personal estate, fall in general under the same doctrine, and are subject to the same principles and rules as those which have governed the decisions in respect to property in land. But there are also some distinct considerations which apply to legacies in particular.

Where a parent makes provision for a child by his will, and afterwards gives to such child a portion in marriage, if a daughter, or pays a sum for establishing him in the world, if a son, the legacy is held in general to be adeemed\*. But not so if the provision made in the parent's life-time be not of the same kind with the legacy<sup>f</sup>, or be made subject to a contingency<sup>g</sup>, or if it be made expressly in satisfaction

Of ademption of legacies by subsequent advancements.

\* 1 P. Wms. 681. *Hartop v. Whitmore.*

<sup>f</sup> 1 Bro. C. C. 425. *Grave v. Earl of Salisbury.*

<sup>g</sup> 2 Atk. 491.



Wherever the subject of a specific legacy is withdrawn, the legacy must fail.

The distinctions as to what is specific and what is general have run into great subtlety.

of another claim<sup>b</sup>, or if the two gifts be upon different terms<sup>c</sup>. Where the subject of a specific legacy is withdrawn, the legacy must fail; but there are many nice, and some, as it should seem, over-curious distinctions, as to what, to this effect, shall be considered as *specific*. Where a sum of money has been bequeathed out of a particular fund, it has, for the most part, been considered as a general legacy, or *legatum in numeratis*, so as to entitle the legatee, if the testator receive it in his life-time, to have it made good out of the general effects<sup>d</sup>. But other cases have been decided a different way<sup>e</sup>.

The courts on this subject have run into such nicety as to adopt distinctions between a bequest of a sum of money due on a bond from A. and a bequest of such debt generally, holding the legacy in the former case to be pecuniary, and in the latter to be specific<sup>f</sup>. And a difference has sometimes been taken between a voluntary and compulsory payment of a debt after a bequest of the same; considering the voluntary payment as not indicating any change of mind in the testator, and therefore not an ademption, while the payment procured by compulsion has been looked upon as the result of an active step taken by the testator in derogation of his own gift<sup>g</sup>. But this distinction has been denied in other cases (2).

<sup>b</sup> 3 Bro. C. C. 192.

<sup>c</sup> Id. Ibid.

<sup>d</sup> 1 P. Wms. 777. *Savile v. Blacket*, 4 Bac. Abr. 355.

<sup>e</sup> 2 Fonbl. 367. note (+).

<sup>f</sup> 2 P. Wms. 330. *Rider v. Wager*, and n. 1. and see 2 Bro. C. C. 111. 1 Eq. C. Ab. 302.

<sup>g</sup> 2 P. Wms. 330. n. 1.

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(2) 4 Bac. Abr. 355. n. (b), and see the note in Serjt. Williams's edition of the cases in the time of Lord Talbot, p. 228. to the case

A conversion or specific alteration of the thing bequeathed, as making a raw material, after giving it by will, into a manufactured article, seems to be a clear practical revocation°. Though by the Civil Law it was competent for a man after he had changed the subject of a specific legacy, to declare by his conduct that such a change was no ademption: and the case has been put of a gold chain, which the testator, after having bequeathed it by his will, converted into a cup; the legacy was not adeemed because the cup might be restored to its former shape. This distinction, however, has not been adopted by our law; and Lord Thurlow has declared it to be contrary to common sense to say that, after a legacy has been extinguished, the testator may by his conduct revive it<sup>p</sup> (3).

° 2 Bro. C. C. 110.      <sup>p</sup> Ibid.

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of *Partridge v. Partridge*; but see 2 Vez. Jun. 640. *Coleman v. Coleman*, where this distinction has been admitted as a strong circumstance from which to gather the intention, though not as an absolute or decisive ground.

(3) If the words of Lord Thurlow are correctly reported, his criticism on the distinction seems not to have been just. His reason was grounded on the supposed absurdity of holding a legacy which was extinguished, to be *revived* by the conduct of the testator; but the rule of the civil law did not admit the legacy to have been extinguished.

## SECTION XX.

*Satisfaction in Equity.*

I SHALL here add a few words on the equitable doctrine of satisfaction, as having an affinity with my present subject, without presuming to enter at large into the consideration of the cases, which would greatly multiply my labour without much profit to the reader.

Of the distinct meanings of the terms *satisfaction* and *performance*.

This word *satisfaction*, from its frequent and too vague adoption in courts of equity, seems to have introduced no small confusion of ideas, and I venture to question whether it is often used with technical precision. By considering what it is not, we shall perhaps be soonest conducted to the true apprehension of what it really is. Lord Thurlow declared himself to have met with continual disappointment in his attempts to establish a broad and useful distinction between cases of *satisfaction* and *performance*. Since, however, we are forbidden to treat these terms as synonymous, by the rules of construction which have separated them in application, we must not be discouraged, even by his Lordship's disappointment, from attempting an approach at least to some practical grounds of discrimination.

To the class of cases called cases of *performance*, as far as the decisions appear to have gone, those seem properly to belong, wherein a man being under

a covenant to do something which is to take effect after his death, does an act in his life-time, or leaves a consequence to arise after his death, which virtually includes, or *is, in substance*, the thing intended. Thus in *Blandy v. Widmore*<sup>a</sup>, where a man covenanted to leave his wife 620*l.* and died intestate, and the wife's distributive share came to more than 620*l.*; and in *Wilcocks v. Wilcocks*<sup>b</sup>, in which a man on his marriage covenanted to buy lands to the value of 200*l. per annum*, and to settle them by way of strict settlement, and afterwards purchased lands of that value, but made no settlement, and died, and left the purchased lands to descend to his eldest son, the eventual benefit in both these cases operated as a presumed *performance*, and not as a *satisfaction* of the engagement<sup>c</sup>. It is true, that in *Wilcocks v. Wilcocks*, the eldest son took by the event a fee simple instead of an estate in tail, but *he* was not the person to take an objection on *that* ground; and Sir Joseph Jekyll, in observing upon this case<sup>d</sup>, declares his opinion, that if the eldest son had aliened the fee, and died without issue, the second son could not have recovered the estate by virtue of the settlement; which observation, if just, furnishes a strong distinction between a case of performance and a case of satisfaction; for as a satisfaction, it is very clear it could have only bound those (1) by whom the benefit was felt<sup>e</sup>.

<sup>a</sup> 1 P. Wms. 323.

<sup>b</sup> 2 Vern. 558.

<sup>c</sup> *Lee v. Cox*, 3 Atk. 419.

<sup>d</sup> 3 P. Wms. 225.

<sup>e</sup> Vide *Wilson v. Pigott*, 2 Vez. Jun. 355.

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(1) The reporter, indeed, adds a query, whether, if the eldest son had died before the next term, so as that he could not have

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Construc-  
tive per-  
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teral act.

In cases of this class, though the intention may not be manifested in expression, yet if no contrary grounds of inference exist, the thing intended or engaged to be done being *in effect* performed, the presumption against double portions or provisions prevails'. It seems, indeed, that if the effect of the thing be partly performed, such partial performance fulfils the obligation *pro tanto* in equity: thus where a sum of 30,000*l.* was covenanted by a man, on his marriage, to be laid out in land to be settled on himself for life, with remainder to his first and other sons in tail, and the covenantor died, having laid out only a small part of that sum on the purchase of some land, which he left to descend to his eldest son, Lord Talbot decreed it a performance *pro tanto*<sup>5</sup>. So also the rule seems to be, that where a man covenants to do an act, and he does that which may be converted into a performance of his covenant, he shall be presumed in equity to have done it with that intention. Thus where<sup>6</sup> one covenanted by his marriage settlement with the trustees to pay to them two several sums, amounting to 2000*l.* to be laid out in land, to be settled to the uses of the marriage, and did not pay the same, but after having purchased an estate for 2150*l.* died intestate, without having made any settlement of such estate, though it was strongly contended, that as the husband had covenanted to

<sup>5</sup> Vide *Weyland v. Weyland*, 2 Atk. 632. *Prince v. Stebbing*, 2 Vez. Jun. 409.

<sup>6</sup> *Lechmere v. the Earl of Carlisle*, 3 P. Wms. 227.

<sup>7</sup> *Snowden v. Snowden*, 3 P. Wms. 227. in Notis.

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suffered a recovery, the second son ought then to have been barred of his chance under the settlement.

pay the money to the trustees, he could scarcely mean a performance when he purchased land himself, yet his Honour declared, after admitting that if the case had been *res integra*, he should have thought the reasoning made use of entitled to great consideration, that the case was within the principle of *Lechmere v. the Earl of Carlisle*.

But it seems a settled rule, that to constitute a performance, the eventual benefit must correspond in time with the period at which the stipulated benefit was to take place: thus where a testator being under a bond to leave 300*l.* to be paid in one month after his death, bequeathed a legacy of 500*l.* to be paid in six months, this was held to be no performance<sup>1</sup>.

The constructive performance must correspond in time with the stipulated benefit.

The true reason of the difficulty which has been so often confessed, of separating cases of performance from cases of *satisfaction*, seems to have arisen from the want of annexing a just idea to the word *satisfaction*, which is, in truth, a term of loose and general signification, according to the use which has been always made of it in the courts of equity; and has been adopted popularly to express the final and substantial effect, as well of cases of *performance*, as of cases of *election*, and cases of *ademption* or *revocation*, which are the terms truly expressive of the distinct means and operations of law, by which the result described by the word *satisfaction* is severally produced. It would, it is conceived, be very difficult, if not impossible, to suggest an example of a pure case

<sup>1</sup> *Haynes v. Mico*, 1 Bro. 129. and see *Richardson v. Elphinstone*, 2 Vez. Jun. 464. See *Garthshore v. Charlie*, 10 Vez. Jun. 1.

of satisfaction, if we treat the term as having an exclusive and appropriate sense, and not rather as generically comprehending certain specific varieties of equitable rules and technical consequences.

**Satisfaction** is the general term, expressing the final effect of performance, election, and revocation.

Every case upon a will made by a person under a binding contract, unless it be considered as an actual performance, can only amount to a case of election; for how can a testator by his will forcibly substitute *another* thing in the place of *that* thing which he was bound by his contract to perform; or how can such a substitutionary disposition have any other operation than, by giving a better thing in lieu of the thing contracted for, to engage and ensure the choice of the devisee or legatee, on highly presumable grounds of preference? If such a case is termed a case of *satisfaction*, it is because such is the final consequence of an *election*; for it may be presumed almost as certain that, where a greater is proposed in the place of an inferior benefit, the condition will be accepted. In strictness, therefore, this is a pure case of election, or of *satisfaction working by election*.

Payment is performance. Thus where a legacy is bequeathed to a creditor, equal to or exceeding the amount of the debt, the debt is considered as meant to be answered by, or included in, the gift. This is therefore a *satisfaction by performance* (2).

Where a man, having granted a benefit or provision by a voluntary and revocable instrument, by a subse-

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(2) Vid. post. Cap. V. Sect. 2, where this rule of presumption is more largely considered.

quent instrument makes an advancement of some other bounty, or gratuity, by way of provision, to the same object (3), and the circumstances of the case warrant the inference that the second provision was meant to take place of the first, this is not properly a case of satisfaction. A satisfaction it *ultimately* may be, but the true operation of it is to *revoke* or *adeem* the legacy. Neither is the term satisfaction expressive, in any other sense than as a discharge, of its ultimate effect in equity, since a smaller sum given in the lifetime may, under circumstances, annul a greater provision by will<sup>1</sup>.

But if a legacy of a larger sum can be wholly set aside by the substitution of a less, this cannot be called a performance, still less a satisfaction *by* performance, and less still a satisfaction *by* election ; but there seems to be no impropriety or confusion of terms in calling it a *satisfaction*, (meaning only thereby a discharge), *by revocation* or *ademption*. And this phrase is the more appropriate, because it is certainly not in strictness of legal language an *ademption* or *revocation simply* : it is a satisfaction working *by way of* revocation ; for in truth it operates as a revocation on a principle of equitable presumption<sup>1</sup>.

It does not redound much to the accuracy of a science to multiply terms, and apply different rules to

<sup>1</sup> Vide *Hartop v. Whitmore*, 1 P. Wms. 680. *Shudall v. Jekyll*, Atk. 517. *Rosewell v. Bennett*, 3 Atk. 77.

<sup>1</sup> Vide *Ellison v. Cookson*, 1 Vez. Jun. 100.

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(3) Vid. post. Cap. V. Sect. 1. where the doctrines of equity on the subject of double portions is considered more at large.



them, without first distinguishing between the different ideas to be implied by those terms: and, therefore, until the word 'satisfaction' has a more appropriate and exclusive sense, it will only perplex the subject to talk of cases of satisfaction as distinguished from cases of performance, cases of election, and cases of revocation. The idea which is meant to be conveyed by satisfaction, simply used, is neither descriptive of cases of performance, cases of election, nor cases of revocation. It is not descriptive of *performance*, because it is not used to signify the identical, or substantial, or virtual effectuation of the thing contracted to be done, but the *substitution* of one thing for another. . And as there are only two sorts of cases, wherein a *substitution* can take place, viz. where the thing to be done is voluntary, and where it is obligatory or resting in contract, in the former of which cases the satisfaction operates by *revocation*, in the other, by putting the party benefited to his *election*, the *final* consequence *only* of each operation is properly expressed by the word *satisfaction*.

## CHAP. III.

## REPUBLICATION OF WILLS.

## SECTION I.

*The Doctrine of early Decisions.*

**AFTER** the statutes 32 and 34 Hen. 8. the courts of justice were frequently divided on the validity of parol republications of wills of lands ; and it appears that, in opposition to the clear sense of those statutes, the favour with which all testamentary dispositions were regarded, sometimes gave the effect of a republication to slight and unconsidered expressions. In the case of *Beckford v. Parnecott*<sup>a</sup>, which was determined in the 37th year of Elizabeth, a man seised of lands in A. devised the same to B. and C. and appointed them his executrixes, and then purchased other lands in A., and being requested to sell the lands which he had lately purchased, refused so to do, saying, “ No, they shall go with my other lands in A. to my executrixes ;” and afterwards being sick, the will was read to him, without his making any observation ; but in a codicil, which he annexed, he gave legacies of goods to other persons on his death. Upon a question being made, whether by these words spoken to a stranger, the will was republished, so as to make the

<sup>a</sup> Cro. El. 493.

new purchased lands pass ; Fenner, Clinch, and Popham held them to amount to a new publication (1).

In *Fuller v. Fuller* (2), which took place much about the same time with that of *Beckford v. Parnecott*, where the devise was to the testator's son Richard, and the heirs of his body ; which Richard afterwards died in the life-time of the testator, and the testator said, " My will is, that the sons of Richard, my deceased son, shall have the land devised to their father, as they should have had if their father had lived, and died after me," Popham and Fenner held, that this was a new publication to carry the land to Richard's son, but Gawdy and Clinch were of a contrary opinion.

The point of republication was also frequently in agitation after the statute of 29 Car. 2. c. 3. and there are early decisions of great laxity on the subject, notwithstanding the provisions of that statute. Thus, in *Cotton v. Cotton*<sup>b</sup>, which was before the Court of Chancery in the year after the passing of the statute

<sup>b</sup> Freem. 264. 2 Ch. Rep. 138.

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(1) According to the report in Mod. 404. Gaudy J. doubted. Dyer, 143 *a. marg.* pl. 55. cites S. C. as adjudged, and says, the main reason given by Fenner was, that the annexing of the codicil amounted to a new publication.

(2) Cro. El. 423. In Mod. 353. where the same case is reported, the reporter adds a query, and says, the reason given for the difference in opinion was, because the last publication was not in writing ; but the others thought there was enough before in writing, to pass the land to the issues ; though there they were to take by descent, but, under the republication, by purchase. The better opinion appears clearly to have been that of Gawdy and Clinch, according to the analogy of all the best cases.

of frauds, A. being seised of several lands in D. made his will, devising his lands in D. and all other his lands and tenements whatsoever unto his wife, and afterwards purchased *other* lands, and then discoursing with B., B. desired him to let him have those newly purchased lands at the rate at which he bought them; and the testator answered, "No," for that he had made his will and settled his estate, and he intended that his wife should have his whole estate; the court inclined strongly to hold this a new publication, and particularly with respect to the lands; and that it was not material that the words should have been expressed *animo testandi*, for that must necessarily be intended when the discourse had particular reference to the will. By the report of the same case in Chancery Reports, it appears that the point of republication was referred by the Court of Chancery to a trial at law, at which a special verdict, by the direction of Lord Chief Justice North, was found, and on a solemn argument before all the Judges of C. B. they unanimously gave judgment for the devisee against the heir at law.

About forty years afterwards it was held by Lord Macclesfield, when he sat as Chief in the King's Bench, that since the statute of Charles, there could not be an implied republication of a will of lands, even by the execution of a codicil referring thereto, but that the will must be re-executed (3). At a trial at bar before his Lordship and the other Judges of the

Whether there can be any implied republication of a will, since the statute of frauds.

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(3) That a will may be republished by the testator's repeating upon it the ceremonies required by the statute, *vid. Herbert v. Tardal*, 1 Sid. 162. 1 Keb. 589.

King's Bench, the facts of the case appeared to be these. The Earl of Bath<sup>e</sup>, by his will dated October the 11th, 1684, duly executed, took notice that his lands were settled upon his sons Charles and John, in tail male, and then devised in these words: In case my sons shall have no issue male, then, for the preservation of my name and family, I devise my said lands unto my brother B. G. and the heirs male of his body issuing. B. G. died in the life-time of the testator, having issue George then Lord Lansdown, by which the devise to B. G. in tail male lapsed. On the 15th of August, 1701, the testator sent for seven persons and said, "I sent for you to be witnesses to my will," sometimes varying his phrase, and saying, "to be witnesses to the republication of my will;" and then took a codicil, dated 15th August, 1701, in one hand and the will in the other, and said, this is my will whereby I have settled my estate, and I publish this codicil as part thereof; and then signed the codicil, (which lay upon the table with the will) in the presence of the witnesses, who subscribed it in his presence.

By the codicil, he devised in these words: "Whereas, I heretofore made my will, dated 11th October, 1684, which I do not intend wholly to revoke, but in regard to the many accidents and alterations in my family and estate, I, by this codicil, which I appoint to be taken as part of my will, devise as follows;" and then devised divers manors, &c. to his son Charles and his heirs, and 100*l. per annum* to his nephew, then Lord Lansdown, for life. He then put the will and codicil together in a sheet of paper, and sealed them up in the presence of the

\* Panphrase v. Lord Lansdown, Vin. Abr. tit. Dev. (Z) 22.

same witnesses, but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper, but to the codicil only. And by Parker, Ch. J. and by the whole court, this was held no republication; for, since the statute 29 Car. 2. there shall be *no republication by implication*, but the will must be *re-executed*, otherwise a devise of lands shall not be good.

Sir William Lytton<sup>a</sup>, by his will 23d March, 1700, devised all his lands to his nephew Lytton Strode and his heirs, and directed that he should take the surname of Lytton: and his personal estate he devised to Dame Russell, his sister, and Lytton Strode, and made them his executors. After his will made, Sir William Lytton purchased the equity of redemption from the mortgagors in fee, of premises which were mortgaged to him before he made his will; and on the 13th June, 1704, by a codicil attested by three witnesses, he said, I make this codicil which I will shall be added to and be part of my last will which I have formerly made; and the Lord Chancellor Cowper, assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, on the 16th June, 1706, decreed that this was not a republication, for, that since the statute of frauds, there could be no devise of lands by an *implied republication*; for the paper in which a devise of lands is contained, ought to be *re-executed* in the presence of three witnesses.

With respect to the first of these two cases, determined by Lord Parker and the Judges of the Court

If an estate be limited to B. and

<sup>a</sup> Lytton v. Lady Falkland, Vin. Abr. tit. Dev. (Z.)

his heirs, and B. die in the testator's lifetime, the devise lapses; and a republication of the will does not give to the heir of B. a claim by purchase,

of King's Bench, though the resolution seems to have been grounded upon the rule then adopted, of holding the statute of frauds to be inconsistent with all implied republications of wills, and which consequently forbad such effect to be given to a codicil which *declared no positive intention to republish the will*; yet, according to the principle of the case of *Brett v. Rigden* \* above mentioned, and the rule of construing a republication of a will not to expand or alter the sense of its expressions, or the legal effect of its limitations, but to apply those expressions and limitations to the existing state of the subjects and objects of the dispositions at the date of the republication, it does not seem that any other judgment could have been given, even on the supposition that the will *was* republished; for if a will limits an estate to go by descent, and the person through whom the descent is to be transmitted dies before the testator, the devise clearly lapses; and if such will is republished, no person can take an estate under it in any other way, than in that in which the *original* limitation was calculated to give it to him: he cannot take as a *purchaser* what, according to the effect of the limitation, he was designed to take by *descent*.

The same law, where the devise is of an estate to a man and the heirs of his body, succeeded by the words "And for want of such issue."

The principle of this reasoning was recognised in *Simpson v. Hornsby* †, the question in which case arose upon the will of one T. A. who, having a wife and only two daughters, devised lands in several towns to his wife, for life, for her jointure; and, after the death of his wife, to his daughter Bridget and the heirs male of her body; and for want of

\* Plowd. 345. and see Hartop's case, Cro. El. 243.

† Prec. Ch. 439.

such issue, to his daughter Jane for her life, and after her death, to her first and other sons, in tail male successively, with several remainders over. Bridget died in her father's life-time, leaving issue a son, whom the grandfather took into his own house, and expressed much kindness for. Afterwards the grandfather made a codicil which began thus: "A codicil to be annexed to my will." And thereby he gave some part of a leasehold estate, (which, by his will was given to his daughter Bridget) to her son, added another trustee for some charities, and duly executed the same. And the Lord Chancellor, after looking into the books, said he found it already settled, that Bridget dying in the life-time of the testator, the heirs male of her body could not take by purchase, for these words, 'heirs male of her body,' were inserted to express the quantity of the estate; though if the thing were *res integra*, he thought it plainly the intention of the testator, that Jane should not take till there should be a failure of the issue of Bridget, for this he thought the words *for want of such issue* fully imported.

These cases, therefore, contained circumstances which would have been an answer to the claims set up under the will on the ground of its being republished by the codicil, without opposing the doctrine of an implied republication; for, upon the principle just above discussed, the republication of the will would not have extended the devise to the parties claiming by reason of it in those cases. However, in Lord Lansdown's case, we have observed, that Lord Parker in terms denied the possibility of any *implied* republication of a will of lands since the statute of frauds; and in the case above mentioned of Lytton



*v. Falkland*, the resolution *could* only be founded upon the supposed effect of the statute, to exclude all implied republications, where real property was in question.

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## SECTION II.

### *Of the Republication by Codicil.*

ABOUT ten years after Lord Macclesfield, then Lord Chief Justice Parker, had decided the case of *Panphrase v. Lord Lansdown*, in the Court of King's Bench, *Acherley v. Vernon* \* came before him in the Court of Chancery, when his Lordship held an opinion on this subject, not conformable to that which he is represented to have pronounced on the former occasion. The case was as follows :

J. S. by a will, properly executed, dated the 17th January, 1711, devised to M. his wife 1000*l.* *per annum*, for her life, to issue out of his real estate at H., &c. ; to his sister E. 200*l.* *per annum*, for her life ; and 1000*l.* to L. her daughter, for her portion ; and after other legacies, he devised the residue of his real and personal estate to A. B. C. D. and E. and their heirs, executors, and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and directed that his trustees should stand scised and pos-

\* Com. 381.

sessed of his real and personal estate to the uses of his will, during his wife's life ; and after her decease, if he should die without issue, to the intent that his freehold and leasehold estates, and the lands to be purchased, should be settled to the use of the defendant G. for 99 years ; then to his first and other sons in tail male, &c. J. S. purchased several fee-farm rents, assart rents, and other lands and tenements, and then by a codicil, dated 2d February, 1720, being two days before his death, he recites, that he made a will, dated 1st January, 1711, and then says, " I hereby ratify and confirm the said will, except in the alterations hereafter mentioned. The portion to my niece L. shall be made up 6000*l.* and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c. to my executors and trustees in my will named ; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will, to my trustees and executors in my will named, to the same uses, and subject to the same trusts to which I have mentioned to devise the manor of H., and the bulk of my estate ; and I revoke that part of my will, whereby I appoint A. B. and C. three of my trustees in my will, and I desire K. and N. to be two of my trustees, and devise my said real estate to them accordingly." Lord Chancellor Macclesfield decreed, that the will was confirmed by the codicil ; that J. S.'s signing and publishing his codicil, in the presence of three witnesses, was a republication of his will, and both together made but one will ; and by the said will and codicil, his fee-farm rents, assart rents, and lands, contracted to be purchased, and all his real and personal estate, (except

the copyhold purchased before his will) did well pass. On appeal to the Lords, the decree was affirmed.

Notwithstanding the codicil in the case last produced *expressly confirmed* the will, yet the decree of the court, and judgment of the Lords, have been considered as standing on the *general* ground, that *every* executed codicil refers to and acts upon the will, and must in its nature not only suppose the existence thereof, but must attract it into an union with itself, bringing it down to its own date. And upon the authority of this case it stands, that whatever be the apparent purpose of making the subsequent instrument, and whether the subject of its express disposition be real or personal estate, if it import to be a codicil, and have the signature of the testator, and the attestation of three witnesses, agreeably to the directions of the statute in respect to wills of real property, it will have the effect of republishing the will.

This interpretation of the ground of the decree in *Acherley v. Vernon*, seems to be built upon the *general* expressions of Lord Macclesfield, in that case, "that the codicil being executed and attested by three witnesses, was a republication of the will; and that they became one will;" and this seems the safest ground for the doctrine to rest upon, for the words of confirmation in the codicil, in *Acherley v. Vernon*, and those declaring the codicil to be part of the will, were only the expression of the tacit meaning of every codicil, which in its very nature supposes and recognises the existence and operation of the antecedent will.

That this was Lord Hardwicke's understanding of the case of *Acherley v. Vernon*, clearly appears from the expressions used by him in *Gibson v. Lord Mountfort*<sup>b</sup>, where his lordship says, that in *Acherley v. Vernon*, it was the opinion of the judges, that the codicil was incorporated with the will, *which made it a republication*: thence deducing this general proposition, that every codicil executed according to the statute of frauds, to whatsoever part of the property it may relate, operates as a republication of the will. It was admitted for the heir, said his lordship, that though it is a codicil only to a personal estate, yet if there is a general clause of confirmation of the will, that *that* will make the codicil, duly executed, a republication of the will. But, said the same Chancellor, this will make *every* codicil a republication, if it is executed by three witnesses, though it relates only to personal estate; for a codicil is, undoubtedly, a farther part of the last will, whether it be *said so* or not.

But in the *Attorney-General v. Downing*<sup>c</sup>, the Court seemed to be inclined to a *middle* course between the case of *Acherley v. Vernon*, wherein the mere act of making a codicil, executed according to the statute, was a republication, and those of *Panphrase v. Lord Lansdown*, and *Lytton v. Lady Falkland*, in which all implied republication was excluded; by requiring an intention to republish to be declared or expressed, or otherwise distinctly manifested, by the testator, in order to give to his codicil that effect. \*And Lord Chancellor Camden held, that the annexation of the codicil to the will was *one of the modes* by

<sup>b</sup> 1 Vez. 492, 3.<sup>c</sup> Ambler, 571.

which such intention might be declared, and was *therefore* a republication. His Lordship seemed to think, that the *expressions* used in the codicil, in *Acherley v. Vernon*, were the foundation of the decree; for the words, he said, were so blended with, and incorporated into the will, that the one could not stand without the other.

The present doctrine holds every codicil, unless it be confined in expression, a republication of a previous will, if such codicil be executed and attested according to the statute.

By the settling case of *Barnes v. Crowe*<sup>4</sup>, the case of *Acherley v. Vernon* has been set up as the great authority on this subject, to the full extent of the doctrine ascribed to it by Lord Hardwicke, in *Gibson v. Mountfort*, as above laid before the reader; and the effect of *annexation* was there denied, as being only parol evidence of a republication, which Lord Commissioner Eyre said, could not be received since the statute of frauds. "If we disentangle ourselves from the rule, said the Lord Commissioner, that there shall be *no republication* without *re-execution*, the principle that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will, at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because by the nature of it, it *supposes* a former will, refers to it, and becomes part of it; (1) and being at-

<sup>4</sup> 7 Vez. Jun. 486.

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(1) Whatever number of codicils a man makes, they are all parts of his previous will; in so much that, if a testator, after making his will, makes a codicil or codicils in any way modifying its dispositions, and afterwards by any other testamentary instrument ratifies

tested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three witnesses. Before the statute of Charles II. it was no part of the essence of the republication that the will should be re-executed; any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute, continued the Lord Commissioner, re-execution of the will is not necessary; nothing more is required than a writing according to the provisions of the statute, expressing that intent."

In the late case of *Pigott v. Waller*\*, before the present Master of the Rolls, his Honour submitted to the authority of *Acherley v. Vernon*, as that case was understood by Lord Hardwicke, in *Gibson v. Mountfort*, and by Lord Commissioner Eyre, in *Barnes v. Crowe*, but not without expressing some disapprobation of the reasonings on which that authority was supported, and a predilection for the old rule, as it stood upon the cases of *Lytton v. Lady Falkland*, and *Panphrase v. Lord Lansdown*; for, said his Honour, a direct republication or re-execution (2) is an *unequivocal* act, making the will operate precisely as if it were

\* 7 Vez. Jun. 98.

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and confirms his will, he ratifies and confirms it together with the codicils which have been made to it, and subject to whatever changes they have made in it. But if a testator after making his will, makes another will inconsistent with the first will, and afterwards by a will or codicil, effectual as such, confirms the prior will, the effect of the intermediate will is, as it seems, destroyed. See *Cresble v. Mac Dowall*, 4 Vez. Jun. 610.

(2) A re-execution, with a repetition of the ceremonies required by the statute, is clearly a republication.

executed upon the day of the republication ; but a reference to the will proves only, that the devisor recognises the existence of the will, which the act of making a codicil necessarily implies ; not that he means to give it any *new* operation, or to do more by *speaking of it*, than he had already done by *executing it*. Why *his speaking of it* should make the will speak, as it is said, is not very easily discernible, as a question of intention. If he speak of it at all, he must speak of it as existing upon the last day as well as the first ; but can that shew that he means it to exist in any *other* form, or with any *other* effect than he originally gave it. ;

But his Honour concluded by saying, that *Barnes v. Crowe*, afforded a certain rule ; and if he departed from that, it would only be to set every thing loose again ; not to get back to, what he thought better, the *old rule*, for then *Acherley v. Vernon* would be in the way. He was therefore disposed, for the convenience of adhering to settled rules, and former decisions, to hold the codicil a republication.

From what has been said it may be collected, that though a codicil properly executed makes the will speak, (as it is expressed) at the date of the codicil, yet it must have words clearly applicable to the intermediate acquisitions, or it cannot have the effect of passing them. And if it had a specific reference to a thing existing when it was first published, but subsequently withdrawn, the republication of it by a codicil will not make it operate upon another subject, which has come by substitution into the place of the thing so withdrawn, though precisely similar in its amount and quality. Thus, where a man, by his

If a will has a specific reference to a thing subsisting when it was first published, but subsequently withdrawn, the

marriage settlement, having a power to charge a sum of 2000*l.* upon certain premises, made his will accordingly, disposing of this sum, and afterwards by a subsequent settlement extinguished his former power, and created to himself a new power of charging the same sum on other property, and afterwards made a codicil with three witnesses, making no mention of the power; the Master of the Rolls, Sir William Grant, held clearly that the power itself being gone before the death of the testator, the will had nothing to operate upon, and could not be applied to the new power. It is true, he observed, a codicil has the effect of republishing a will, and makes it speak at the time of the republication. But here the will speaks only of the power given by the marriage settlement, which was as much gone as if it had never existed. It was a *new* power, for a *new* consideration, affecting *different* estates<sup>r</sup>.

republication of it by a codicil will not make it operate upon another thing, which has come by substitution into the place of the thing so withdrawn, though similar in amount and quality.

This then appears to be the proper understanding of the doctrine, viz. that the codicil, if executed so as to act upon the subject, brings down the will to its own date, and makes it speak as if it were made at that time (3); but that still it is made to speak

<sup>r</sup> 7 Vez. Jun. 499. *Holmes v. Coghill*:

(3) There is a difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act; and upon this distinction, will, it seems, depend the question, whether or not the *first act* of the testamentary disposition will require to be executed and attested according to the statute. But whether the subsequent writing be

Difference between a codicil and the sequel of an inceptive will.



only *its own sense*, and if it had any particular view to any particular object or purpose, which ceased to

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considered as a republication by way of codicil, or as the conclusion of something already begun, such *subsequent* writing to be effectual to pass land, ought to be executed as the statute directs in the case of a devise of lands.

Difference between a codicil and a paper incorporated by reference.

When a will properly executed to pass freehold estates, refers to an unexecuted paper *already in existence*, by an unambiguous description, and expressly adopts its contents among its own dispositions, such paper is, with exact propriety, said to be incorporated into, and to be executed by the execution of, the will, for its relation to it is that of the part to the whole; but where a *codicil* is said to be part of, or incorporated into a will, this union must be understood to be the effect of its *first acting upon the will by its own force, and attracting it to itself*. The will must be completed by a previous execution to be so republished, and when so republished must be regarded as a new will. And it was upon this principle that in the Attorney General v. Heartwell, AmbL. 451. where a will was made before the statute of mortmain, bequeathing personalty to be laid out in lands for a charity, and after the statute the will was confirmed by a codicil; the codicil, by making the will a new will, brought the devise within the statute; and the same, accordingly, was declared void by Lord Northington.

Hence we see the necessity for both will and codicil to be executed according to the statute. In the case put of the reference by the will to an existing paper, such paper is mute till it is acted upon by the instrument that incorporates it, and has no testamentary operation before the execution of such instrument; whereas in the instance of the *codicil*, *the will is first acted upon thereby*, and being brought down to the date thereof, speaks again with reference to the state of the property, by virtue of *the execution of the codicil*, with which it becomes incorporated, and thus, by a consequence of reasoning, becomes *re-executed* and *re-published* with the solemnities prescribed by the statute. And this is properly the republication by codicil, the effect and meaning of which is, that the terms and words of the will shall be construed to speak with regard to the property of the testator, and the objects of his dispositions, just as they stand circumstanced at the date of the codicil. In construing such will so republished, it must be considered therefore what

exist during the interval between the will and codicil, the codicil will not, from the accidental aptitude of the words to another subject created or acquired since the will, have any operation upon that which was so entirely out of the original view of the testator.

In a very recent case (4), circumstanced in some respects like the one last above cited, where a will had been made, and a recovery subsequently suffered, upon which was reserved a power to the testator to declare the uses of the land by his will or codicil, and then the testator made a codicil confirming his will, except where altered by that codicil, but taking no notice of his power, the Court of King's Bench, upon a case for their opinion out of Chancery, held that the power was not executed by the codicil: one of their reasons for which opinion seemed to be, that

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the words of the will at the time of the republication import. Their *sense* cannot be enlarged, but their *operation* may, if time or accident have increased the amount or number of the particulars comprised within the compass of its expressions \*.

(4) 10 East, 242. *Lane v. Wilkins*. It must be admitted however, that the more prevailing and ostensible reason seemed to be, that, as the will declared only the testator's intention not to disturb the existing limitation in tail by suffering a recovery, but to leave the estate to go as it stood limited, this declaration amounted to no devise at all; and when, after having altered his intention, and taken a new estate in the premises by suffering a recovery, reserving to himself a power of appointment by deed, will, or codicil, he executed a codicil expressly confirming his will, such codicil could not be considered as carrying the will further than its natural and proper effect, which was not a positive devise or disposition, but the declaration of a purposed omission.

\* It is obvious upon equitable principles, that if a will is republished, containing a general devise of the testator's estates, an estate only contracted for after such general devise, will pass. 10 Ves. Jun. 603. *Broome v. Mouck*.

they could not infer an intention to execute the power from the mere general confirmation of the will by the codicil ; though they readily admitted that it was not necessary, that any express reference should be contained in a will, to make it a valid execution of a power.

The effect of a codicil as a republication may be restrained by its special terms.

It has also been solemnly decided, that this effect of a codicil upon a will, of making it speak as to the existing property of the testator, may be restrained by the manner in which the *codicil* is expressed. Thus, where the codicil, reciting the devise by the will, revoked the same as to two of the trustees, and then devised the *said* lands, &c., lands purchased between the will and codicil have been adjudged not to pass<sup>e</sup>.

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### SECTION III.

#### *Of the Republication of Wills of personal Estate.*

AS it is hoped that by this view of the cases the progress of the doctrine of republication, as to real estate, is made clear to the reader ; I shall now say a few words upon the question of the republication of wills of personal estate. In respect to this description of property, the doctrine is said not to have been

<sup>e</sup> 2 Bos. et Pull. 500. *Bowes v. Bowes*, (House of Lords).

changed by the statute of frauds ; and this appears to have been the opinion of Lord Hardwicke, from the words used by his Lordship in the case of *Abney v. Miller*<sup>a</sup>, wherein the act of republication insisted upon was, that the testator, after renewing his leases, being in search for another paper, and the person who was assisting him, having taken up the will by mistake, he said, "This is my will," not meaning thereby to republish, but to shew that it was not the paper he wanted. His Lordship observed, that to make it a republication, there must be the *animus republicandi* in the testator, which observation warrants the inference, that he was then of opinion, that if the words used *had been declarative of an intention* to republish, they would have been effectual to produce such a consequence. What will be the weight of this doctrine of Lord Hardwicke, when the point comes directly under adjudication, remains to be seen ; but in the mean time, one may be permitted to suggest, that there is a difficulty in conceiving why the clauses of the statute, which affect the publishing of wills, should not also reach to the republication of them.

A republication is a new publication ; and if a will can be republished by parol so as to make it pass property not affected by its original disposition, (1) what is this but making, partially at least, a nuncupative testament, unaccompanied by the forms pre-

<sup>a</sup> 2 Atk. 599.

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(1) This supposes the case of a *specific* bequest, for a general disposition of personal estate would be prospective, and therefore would not raise the question.

scribed by the statute? We have seen that many of the judges struggled hard against admitting a parol republication of wills of *lands*, even before *the statute of frauds*, as being in contravention of *the statute of wills*; and where the requisites are not observed so as to make good a nuncupative testament, the statute of frauds has imposed the same necessity for a written declaration of the will in respect to personalty. No subsequent writing can republish a will of land, since the statute of frauds, unless it be executed so as to be itself capable of passing land according to that statute; why then should a will of personal estate be capable of being republished without the observance of the mode whereby alone a personal will can be rendered effectual?(2)

The destruction of the revoking instrument may operate as an implied republication by setting up the original will.

This branch of my subject may be concluded by observing, that although words are never allowed to have the effect of republishing a will of lands, (whatever may be the doctrine in respect to personal testaments) yet where an express or implied revocation has taken place, it has been held that the will may be set up again by a species of implied republication, founded upon the destruction of the revoking instrument. As where a testator makes two wills, the latter of which is inconsistent with, or expressly revokes the former, yet if he afterwards destroy the second will, leaving the first in a perfect state, the original will is held to be set up again<sup>b</sup>. And this

<sup>b</sup> *Glazier v. Glazier*, 4 Burr. 2512.

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(2) Words written in a void space left in a will was held by Lord Hardwicke to be a republication. *Carte v. Carte*, Amb. 30. But it is clear that this can only be so in respect to personal estate.

seems to stand upon plain principles, for the first will, being ambulatory during the testator's life, is in existence without any alteration at the time when its operation is to begin, and that which was to be destructive of its operation, is out of the way at the moment when it was to have its destructive effect.

But if a legacy given by a will be adeemed, a codicil, ratifying and confirming the will, has not the effect of setting up the adeemed legacy\*.

\* *Monck v. Lord Monck*, 1 Ball and Beatty, 298. and see *Irod v. Hurst*, 2 Freem. 224. *Drinkwater v. Falconer*, 3 Vez. Jun. 623.

## CHAPTER IV.

## OF THE IMPORT OF WORDS AND PHRASES.

## SECTION 1.

*As to moveable things.*

Goods and  
chattels;  
what they  
compre-  
hend.

“**GOODS** and chattels” are the most comprehensive terms of description for passing property of a personal nature by will. In the civil law all estates are divided into bona mobilia and bona immobilia; and it has been authoritatively said that in wills relating to personal estate words should be construed agreeably to the rules of the civil law<sup>a</sup>. Thus it may be regarded as settled that the word “goods” is sufficient in its general sense to pass the testator’s leases<sup>b</sup> and bonds, where there is nothing expressed to afford an inference of its being used in a narrower signification. But though this is the original and technical

<sup>a</sup> Cro. Eliz. 387. 1 P. Wms. 267.

<sup>b</sup> 1 Eq. Ca. Abr. 199.

sense of the word "goods," yet the word is very susceptible of modification from the context, and it will be seldom found to have this comprehensive effect except where it makes part of the residuary clause. Thus in the case of *Crichton v. Symes*<sup>3</sup>, where the bequest was in these words, *I give and bequeath to B. all my goods, and wearing apparel, of what nature and kind soever, except my gold watch*, Lord Chancellor Hardwicke decreed, that, as these words stood in the will, the testatrix intended to give only her wearing apparel, ornaments of her person, and household goods and furniture, but no other part of her personal estate. And in another case, where, after a devise by a testator, of all his household goods, and other goods, and all his stock, &c. he bequeathed the residue of his personal estate to J. S. ; it was considered that if the devise of all the testator's goods were taken in its largest sense, it would frustrate the bequest of the residuum, which should not be allowed; and that it seemed reasonable that the words "other goods," should be understood to signify things of the same nature with household goods. The decree accordingly was, that the money, cash, and bonds passed by the residuary devise<sup>4</sup>.

Bonds, being a species of choses in action, and as such admitting of no locality, will not pass under a devise of "goods and chattels" *in a particular place*; though they happen to be there at the testator's death<sup>5</sup>. And the same may be said of bills of exchange, promissory notes, judgments and records,

Bonds and choses in action have no locality, and therefore do not pass by a bequest of property in a particular place.

<sup>3</sup> 3 Atk. 61.    <sup>4</sup> *Woolcomb v. Woolcomb*, 3 P. Wms. 112.

<sup>5</sup> *Chapman v. Hart*, 273.



**Bank notes; whether to be considered as cash or as choses in action.**

upon the same principle; but no doubt can be entertained that the word "goods" will extend *generally* to all these securities for money, since the debts themselves are *clearly* comprehended under the term<sup>f</sup>. It is equally clear that money in specie passes under the same word. And bank notes were considered as being carried by the words "goods and chattels" in a will, although the bequest was confined to the goods and chattels in a particular house; bank notes, in the view of the Chancellor, being regarded as in the nature of cash, rather than as choses in action. Had they been looked upon as choses in action, they would, for the reasons above-mentioned, not have passed under the description of goods and chattels *in a particular place*<sup>g</sup>. It has, however, been held that, where a limited and express pecuniary legacy is given, and, by general words, all the goods and chattels in and about the house are afterwards bequeathed to the same person, money in the house will not pass to the legatee, on account of the particular legacy before devised to him<sup>h</sup>.

**Of bequests of goods in a house, &c.**

The general rule is that where a testator devises all the goods in a house or place, the description will relate to, and comprehend, all such as shall be in the house, or place, at the time of the testator's death; and that if they happen to be removed to another place, in the life-time of the testator, they will not pass. But this rule must be under-

<sup>f</sup> *Moore v. Moore*, 1 Bro. C. C. 128.

<sup>g</sup> 1 Ves. 273. But see this point doubted by Lord Eldon, in 11 Ves. Jan. 662.

<sup>h</sup> 2 Ch. Rep. 190. 2 Atk. 112. 3 P. Wms. 112.

stood with some qualification, for if the goods are removed upon some sudden emergency, as on account of fire, inundation, &c., and before they can be returned to their place the testator dies, they shall be considered as if they were actually in the testator's house at his death, and the legacy is not defeated by such an accident<sup>1</sup>.

When the subject matter of a bequest is a collective and fluctuating body, subsequent additions are considered as passing, notwithstanding the terms of the bequest are particular as to place and time; thus it has been said, that if I devise all my flock of sheep *now* on such a hill or in such a pasture, the sheep, subsequently produced, will pass; for it is within the reason of a devise of the personal estate, which being always fluctuating, shall relate to the time of the testator's death. And the same principle has been carried to the devise of the testator's library of books, *now* in the custody of B., under which devise, books subsequently added to the same library, were held to pass<sup>k</sup>. So also in the case of General Guise, who by his will gave all his collection of pictures to Christ Church College, in Oxford, and afterwards sold some and added others to the collection, Lord Camden was clear that the pictures added to the collection passed, upon the principle that the personal estate is fluctuating<sup>l</sup>.

When the bequest is of a collective and fluctuating body; what passes.

But in general cases the word *now* would be considered as restricting the devise to the present state of the thing given.

<sup>1</sup> Ibid. and see 2 Vern. 747.

<sup>k</sup> 1 P. Wms. 597. All Souls' Coll. v. Coddington.

<sup>l</sup> Ambler, 641.

If I devise all the corn *now* in my barn, and part of the corn is afterwards consumed and fresh corn put in, Sir Joseph Jekyll thought such new corn would not pass: though the contrary is laid down in *Swinburn*, 448. But if there be no such words importing individuality, as if a man devise all his plate, and makes subsequent purchases of plate, what he has at his death passes<sup>m</sup>.

Goods on  
board a  
ship.

In the important case of *Chapman and Hart*<sup>n</sup>, a difference was taken between a bequest of goods in a house, and of goods on board a ship. Lord Hardwicke observed, that the latter devise must be taken to be made with a consideration of the several contingencies and accidents they are liable to in such a situation; and if it should be determined that if by any accident they should not be on board at the testator's death, they would not pass, many marine wills would be defeated. If the goods were removed to preserve them, the ship being leaky or likely to founder, or if the testator be removed to another ship, (which is a contingency to which he is daily subject), this will not defeat the legacy. But if a testator devises all the furniture at his house in A., such a devise will not pass furniture intended to be, but not yet actually, placed in the house at A., even though such goods were already packed up and ordered to be carried thither; which was the point in the *Duke of Beaufort's* case<sup>o</sup>.

Household  
furniture  
and plate,  
&c.

As a general rule, though admitting of some qualifications, it may safely be premised that by a devise of

<sup>l</sup> *Plowd.* 343.

<sup>n</sup> 1 *Vez.* 271.

<sup>o</sup> 2 *Vern.* 739.

household goods *plate* will pass <sup>2</sup>; though not by a devise of utensils <sup>3</sup>. But such general bequest of furniture, goods and chattels, by a silversmith, will not carry the *plate* which constitutes a part of his stock in trade, but only the plate used in his house<sup>4</sup>. And the same doctrine has prevailed even in the case of a deed: Lord Hardwicke declared in the case of *Crichton and Symes*<sup>5</sup>, that the House of Lords were never clearer than in the case of *Pratt v. Jackson*<sup>6</sup>, that the word 'goods' related only to the household goods and furniture, and did not extend to the goods of the settler in the way of his trade, or his goods as a contractor for the Government<sup>7</sup>. We find also the same principle further adopted and confirmed in *Le Farrant v. Spencer*<sup>8</sup>, where the devise was of all the testator's household furniture, lincn, plate, and apparel whatsoever. The Chancellor directed the case to be sent to a Master, to distinguish what goods the testator had for his domestic use, and what for trade and merchandise, without which, he said, it was impossible to determine the extent of the bequest, for it clearly included only the former.

Where a testator devises his furniture at or in certain houses named, such a devise will not carry a description of *plate* which the testator was in the constant habit of removing with him from house to house, for that could not be said to be the furniture of one house more

<sup>2</sup> 2 Vern. 572. 638. 1 P. Wms. 425. 2 P. Wms. 419. 3 Atk. 369.

<sup>3</sup> Dyer, 59.

<sup>4</sup> 11 Vezey Jun. 666.

<sup>5</sup> 3 Atk. 63.

<sup>6</sup> See 2 P. Wms. 302.

<sup>7</sup> See the note of the decision of the House of Lords, 3 Atk. 62. 3 Brown's Parliament. Cases, 199.

<sup>8</sup> 1 Vezey, 97.

than another, and it would seem that he meant only the particular furniture of each house<sup>2</sup>.

Under the Duchess of Bolton's will<sup>3</sup> the import of the word '*furniture*' was largely discussed. The testatrix devised her household furniture and farming utensils, which should be within or upon the premises at her death unto Charles Powlett. The Duchess died possessed of a great quantity of plate, which was worth about 1600*l*, some useful and ornamental china, books, pictures, and linen, which were then at her house at Westcomb. The principal question was as to the plate. And his Honour premising that the word '*furniture*', unaccompanied by circumstances, was a word of very general meaning, and comprised every thing contributing to the convenience of the householder, or ornament of the house, adverted to the possibility of a restricted sense being put upon the word by a variety of circumstances which might attend the case. He denied that the question whether the plate would pass or not by the word *furniture*, depended upon the fact of its being in common use or not. If a person of rank buys a service of plate suitable to his quality, *and never uses it*, yet, he thought, the plate would pass by the word *household-furniture*; but that, if a tradesman had a dozen of silver-handled knives and forks, which he commonly used, and had besides a service of plate, which perhaps he bought as a good bargain, the service would not pass. Upon the whole of the case his Honour was of opinion that the *plate* did pass by the word *household-furniture*.

<sup>2</sup> See Equity Cases Abridg. Tit. Devises, (k).

<sup>3</sup> Ambl. 605. Sir G. Kelly v. Powlett.

He was also of opinion that the linen and china, both Linen, china, and pictures. useful and ornamental, as also the pictures, both those which were hung up and others that were in cases, passed by the devise; but, in conformity to the decision in *Bridgeman v. Dove*<sup>a</sup>, he determined that the term *household-furniture* did not include *books*.

In *Snelson v. Corbet*<sup>a</sup> Lord Hardwicke seemed to consider the evidence of the *plate* being *used in the house* as going some way towards determining the question whether it was included or not in a devise of *household-furniture* in the affirmative. In the case of *Jesson v. Essington*<sup>b</sup> Lord Keeper Wright gave it as his opinion, that by a devise of rings and household goods *plate used in the house* did not pass. But the opinion of the Master of the Rolls, Sir Thomas Clarke, in the above-mentioned case of *Kelly v. Powlett* appears to afford very just criteria for deciding this question under all circumstances, and subsequent cases seem mainly to have adopted his principle<sup>c</sup>.

It appears also that since that case it has been considered uniformly, that under the mere term *household-furniture*, *books* will not pass to the legatee<sup>d</sup>: not even where the word 'furniture' has been connected with other things furnishing entertainment to the mind as medals and pictures: and it seems that globes and mathematical instruments are equally out of the scope of the word 'furniture' in a will<sup>e</sup>. Books, globes, and mathematical instruments.

<sup>a</sup> 3 Atk. 202.<sup>a</sup> 3 Atk. 369.<sup>b</sup> Prec. in Ch. 207.<sup>c</sup> See the authority of this case admitted in the case of *Porter and Tournay*, 3 Vesey Jun. 311.<sup>d</sup> 3 Vesey Jun. 311. *Porter and Tournay*.<sup>e</sup> Prec. in Ch. 207. note.

Medals,  
coins, jew-  
els, orna-  
ments of  
the person,  
&c.

Lord Hardwicke was of opinion that under the word medals, curious pieces of current coin kept with medals will pass as such. But ornaments of the person, as jewels, &c. will not pass by a bequest of a cabinet of curiosities, even though such ornaments may be kept together with the curiosities, and occasionally shewn with them. Thus, where E. C. in a codicil to her will made the following bequest, "I give to J. S. my collection or cabinet of curiosities, consisting of coins, medals, gems, and oriental stones, and other valuable things," the question was whether certain ornaments of the person were within the bequest. Evidence being read of persons in the trade as to the different sense of gems and jewels, that the latter meant stones set and prepared for wear, the former the same things when kept for curiosity only, the Lord Chancellor said, he took it that things to pass under the will in question must be *ejusdem generis* with those expressly devised, and that ear-rings, and other ornaments of the person, were part of the personal estate, and not specimens of natural curiosity. Had Mr. Pitt's diamond been in the cabinet as a specimen of natural curiosity, it must have passed to the devisee; and therefore he thought the proper line of distinction was their being prepared for wear, if not worn; and directed an enquiry to be made with respect to their being worn. On the Master's report that they were occasionally worn, the cause came on before his Honour, sitting for the Lord Chancellor, who was of opinion that that circumstance made the difference<sup>f</sup>.

Under a bequest of the use of a house with all the

<sup>f</sup> 1 Bro. C. C. 467. and 22.

furniture, and stock of carriages and horses and other live and dead stock, to J. W. for life; it was held agreeably to what has been above observed, that the plate did pass as being included under the word furniture, but that the wine did not<sup>c</sup>.

In the case of Porter and Tournay, it appeared to <sup>Live and dead stock.</sup> have been the opinion of the Master of the Rolls, that the words *live and dead stock* are of too ambiguous import to receive any certain construction, but that coupled with other words, they might receive a sense correspondent to those words: thus, if after giving furniture, I give all my live and dead stock, I shall be held to mean in-doors stock, as wine, liquors, &c.; and if the word is coupled with what usually forms a part of the property *without* doors, then only such live and dead stock as are out of the house and about the premises will be considered as intended. In Porter and Tournay, the case just alluded to, the words 'live and dead stock' immediately followed the words 'stock of carriages and horses,' and, therefore, the Master of the Rolls applied these words exclusively to the out-doors stock: adverting to the difference between that case, and Gower v. Gower<sup>b</sup>; in which the disposition was, of all other the testator's goods and chattels whatsoever which should be *in and about* his dwelling-house and out-houses.

Standing corn will pass under the description of <sup>Farming stock.</sup> stock of the farm. Thus where one devised a farm in his own occupation, to his mother for life, remainder to G. in tail, and also devised to his

<sup>c</sup> 3 Vez. Jun. 311.<sup>b</sup> Ambler, 612.



mother all his goods and chattels, *stock of his farm*, bonds, &c., and all other his moveables whatsoever, and made her executrix ; it was held that growing corn which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to G. the devisee of the land<sup>1</sup>. And in a subsequent case where there was a similar disposition of the stock upon the testator's farm after a devise of the land in fee, the devise of the stock was held to carry the standing crops of corn ; although in that case the devise of such stock was to the executors to pay debts ; and although there were assets sufficient to pay the debts and legacies without such part of the property<sup>2</sup>.

Stock in trade.

With respect to the words 'stock in trade,' what shall be comprehended in these terms must always in a great measure depend upon evidence of intention, intrinsically or extrinsically collected ; but where there is nothing peculiar in the case to determine the import of the phrase, the popular and usual understanding of the words must govern their interpretation. It may also be a question of some difficulty what words will carry stock in trade, as well as what the words 'stock in trade' will carry. In the case of *Stewart v. Marquis of Bute*<sup>3</sup>, where the testator gave all his waggon-ways, rails, staiths, and all implements, utensils and *things*, at his death used or employed together with, or in or for, the working, management or employment of his collieries, and which might be deemed of the nature of personal estate, in

<sup>1</sup> 6 East, 604. note, *Cox v. Godsalve*.

<sup>2</sup> 8 East, 339. *West and another executors of Moore v. Moore*.

<sup>3</sup> 11 Vez. Jun. 657.

trust to be held or enjoyed with the collieries, Lord Rosslyn decreed that under this bequest money due from the fitters and others and in the Tyne Bank, coals at the pits, and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock in trade passed; which decree was affirmed on the rehearing by Lord Eldon. His Lordship however expressed considerable doubts, which doubts it is conceived related principally to the monies due from the fitters and at the bank (1).

The questions arising upon bequests of stock in the public funds, are very numerous and branching. But in a treatise like the present, intended for general use, it will be expedient to confine the consideration of the subject to clear and practical distinctions.

Stock in  
the public  
funds.

The topic of most frequent discussion on the subject of the bequests of stock, is whether the legacy is to be regarded as specific or general. In the case of *Purse v. Snaplin*<sup>m</sup>, Lord Hardwicke states a specific legacy to be a bequest of a particular chattel, specifically described, and distinguished from all other things of the same kind; which may in other words,

<sup>m</sup> 1 Atk. 414.

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(1) In a case in *Ambler*, 395. where a man devised freehold and copyhold messuages, lands and tenements, to A. for life, with remainder over, and afterwards the residue of his personal estate to B. and made B. executor; and part of the testator's estate consisted of a brew-house and malt-house, which together with the plant and utensils were then in lease; it was held that the plant passed to the devisee; for without the plant the walls could be of no use, and it was material that they were in lease together. The testator must therefore have meant to devise them both together.

as Mr. Coxe observes<sup>a</sup>, be stiled an individual legacy (2). But courts have been led to the construction of bequests of specific legacies by other indicia. Thus in *Jeffreys v. Jeffreys*, afterwards decided by the same great equity judge, the testator having at the time of making his will just so much stock as would *exactly* answer the *two* legacies which he thereby bequeathed, they were both held to be specific. In the case of *Purse v. Snaplin*, before alluded to, there were two legacies of 5000*l.* in the old South Sea annuity stock of the S. S. Company, to two persons respectively; and the testator at the time of making his will and at his death had only 5000*l.* in old S. S. stock. Lord Hardwicke considered these bequests as entitling the legatees to have them made good out of the testator's general assets; and the principle upon which the case was determined was this—that the testator had not so specifically described the subjects of the legacies as to distinguish them from all other things of the same kind. The only distinction between that case and the subsequent case of *Jeffreys v. Jeffreys*, was, that in the latter the actual property answered exactly to both legacies.

In *Ashton v. Ashton*<sup>\*</sup> there were no words of more specific import than in *Purse v. Snaplin*, above cited, neither did the stock of which the testator

<sup>a</sup> See his note to *Hinton v. Pinke*, 1 P. Wms. 538.

<sup>\*</sup> Cas. temp. Talb. 152.

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(2) Thus money, though only a measure of value or amount in specie, may become an individual legacy when it is designated as being in a particular place, as in such a drawer or bag. See 1 Atk. 508. Ambl. 57. Stock does not pass under the word money. See Vez. Jun. 327.

was actually possessed, correspond in amount with the stock devised. The testator devised 6000*l.* S. S. annuities to be sold and laid out in land, to be settled as therein directed, and died possessed of a large personal estate, but had only 5360*l.* in S. S. annuities. Lord Talbot, nevertheless, held the legacy to be specific and not of *quantity* merely. But the late Mr. Serjeant Williams, to whose learned labours we are indebted for the last edition of Lord Talbot's decisions, has observed in a note to this case, that "it seems to have been determined upon the testator's directing the 6000*l.* S. S. annuities to be sold, and the produce thereof to be laid out in a purchase of lands, which strongly implied that the testator only intended to give the S. S. annuities which he was possessed of; and that he did not mean to have additional annuities purchased, in order to be sold out again presently afterwards:"—a remark of which Lord Hardwicke, and not the learned editor, who seems to have forgotten whence he took it, should have the credit<sup>p</sup>.

In the second volume of Domat. 159. it is laid down that when a testator bequeaths a certain thing, which he specifies as being *his own*, the legacy will not have effect, unless that thing be found extant in the succession. "As if I bequeath to such a one *my* watch, or *my* diamond ring, and there be not found, after my death, any diamond ring, or watch among my effects, the legacy will be null." There are cases in our books to the same effect. It is true, that Lord Hardwicke in the case of *Avelyn v. Ward*<sup>q</sup>, seemed

<sup>p</sup> See 1 Atk. 418.

<sup>q</sup> 1 Vez. 425.

to consider that too much weight had been given to the word *my*, and that to rely on it entirely was allowing it too much importance; yet in a subsequent case of *Sleech v. Torrington*<sup>†</sup>, we find Sir Thomas Clarke, whose opinions and reasonings on the construction of wills are always entitled to great esteem, remarking, that it was very material as a circumstance in that case, that no pronoun possessive was added to the description of the annuities. So in the case of *Ashburnham v. Macguire*<sup>‡</sup>, where the words were "*my* 1000*l.* East India Stock," Lord Thurlow laid considerable stress upon the pronoun *my*, and observed, that it had been relied on in many cases in deciding the legacy to be specific.

The general rule is, that a bequest of so much stock is a general legacy unless there is some special ground for construing it specific.

The general rule, however, appears by the result of the cases to be this, that the bequest of stock in the funds is to be regarded as expressive of quantity, in general, and not confined to a particular sum of which the testator may be possessed at the time of making his will, or of his death, unless there is some word, phrase, or constructive ground in the will leading to such restrictive interpretation. Thus, where a testator bequeaths the sum of 12000*l.* of his funded property to T. S. and the residue of his property to B., this is a general pecuniary legacy to be answered out of the whole personal estate<sup>§</sup>. A bequest of so much stock in such a fund, in general terms, is a direction to the executor to procure so much stock for the legatee. This was expressly said by Lord Chancellor Talbot in the case of *Partridge v. Partridge*<sup>||</sup>, in which case a testator devised

<sup>†</sup> 2 Vez. 560.      <sup>‡</sup> 2 Bro. C. C. 108.

<sup>§</sup> See *Lambert v. Lambert*, 11 Vez. Jun. 607.

<sup>||</sup> Cas. temp. Talbot, 226.

1000*l.* capital South Sea Stock to B., and it appeared that at the time of making his will he had 1800*l.* of such stock, and afterwards, by sale, he reduced it to 200*l.* which he afterwards increased to 1600*l.* and died, the alteration of the stock was held to work no ademption.

It is observable, however, that in that case Lord Talbot is stated to have said, that if the testator, after such a legacy, sells out part, and dies, such sale will be an ademption pro tanto; which opinion seems to be at variance with the principle of the case, for if the bequest is to be regarded as a gift of quantity only, and not of a specific thing, and if it be law that where a testator bequeaths so much stock, having none such at the time of his devise, the bequest is to operate as a direction to the executor to procure so much, why should the removal of the stock, or the diminution of it in specie, affect the substance of the bounty. On this point, therefore, perhaps, the case of *Bronsdon v. Winter*\*, has proceeded with greater consistency. There the testator devised the sum of 2000*l.* South Sea Stock, and at the time of making his will had just that amount of such stock; he afterwards sold 1500*l.* of it, and Verney, Master of the Rolls, held this to be no partial ademption of the legacy, but decreed the 2000*l.* stock to be made good out of the testator's personal estate.

In both these last-mentioned cases, the Act of Parliament for changing three-fourths of the capital South Sea Stock into annuities, had taken place be-

\* *Ambl. 57.*

tween the time of making the will and the death, but it followed, a fortiori, from the principles on which other parts of the case were decided, that such parliamentary change could work no ademption.

There can be no doubt, however, that in these points, as in most that regard the construction of wills, the intention of the testator is to be the guide ; and this intention is to be collected from the general tenour of the instrument rather than from particular words or phrases.

Thus in the late case of *Hotham v. Sutton*\*, the intention, though in some degree proceeding upon a mistake as to the fact, was the ground of the Chancellor's judgment. In that case, the testatrix, reciting that she was possessed of 12,700*l.* 3 per cent. Bank Annuities, standing in her name, gave and bequeathed the same, or so much of such Bank Annuities, as should be standing in her name at her death. At the date of her will, and at her death, she had near 15,000*l.* in that fund, besides other stock. Here the recital of the will, though erroneous, was considered as comprising the reason of the disposition—it was the measure of her bounty ; the determination, therefore, was, that the bequest operated only on the sum mentioned in the recital, and that the excess of 3 per cent. Consol. Bank Annuities beyond the amount of 12,700*l.* passed under the residuary clause.

Where a bequest of the interest and dividends will

Before the subject of bequests of stock or funded property is dismissed, it may be useful to advert to a case wherein, with good reason, it was held, that the

\* 15 Vex. Jun. 319.

capital of the stock passed under an express disposition only of the interest and dividends. This was the case of *Phillips v. Chamberlaine*<sup>7</sup>, in which the testator gave all his monies and securities for money, together with all his real and personal estate, to his executors, their heirs, executors, administrators, and assigns, according to the nature and quality of the same premises respectively, upon trust, to sell and dispose of all except the funds and securities; and after various dispositions of determinable interests in the same funds and securities, he directed his trustees to pay all the rest of the residue and surplus of the dividends and interest thereof unto and among four relatives therein named, and the survivor of them, each share to be paid to them severally as they attained the age of 21 years; and if any one of the said four persons should die before he should attain the age of 21 years, the share of the deceased should be divided equally among the three survivors, or if two should die, equally between the two survivors, or should three out of the said four persons die during their minority, the survivor was to be entitled to the whole residue and surplus aforesaid. The question being, whether the residuary clause carried an absolute property to the legatees, or only the use, that is, the interests and dividends that should arise during their respective lives, and the principal be considered as undisposed of, the Chancellor observed, that he had never heard that where a testator gives for ever, and without limitation, the dividends and interest to accrue upon the residue of his personal property, that such a gift would not carry the whole interest. Where they were so given for ever, who was there to claim the capital? When the interest and dividends of a resi-

carry the  
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due are absolutely given to trustees and their heirs, upon trust to pay the interest and dividends to A., and from time to time, and without any limitation of duration, it will carry the whole interest. It is impossible, said his Lordship, to suppose such an absurdity, as would result in this case from the contrary construction. An absurdity may be so great, as to raise a *necessary* implication. A Judge must divest himself of common sense to impute such an absurdity to a testator as to suppose, that he gives the interest to them for their respective lives only, and if any one shall die under the age of 21, then that a share given for life only shall survive to the others. That part of the clause was perfectly satisfactory to shew, that he did intend to give them the absolute interest. If they were only to have an interest for their lives, of what consequence would their deaths before 21 be? If they had it only for their lives there would be no part or share for the survivor to have. It is clear he meant to give an interest that would survive; even independently of the circumstances that it was given as a residue; and it must always be remembered that when the residue is given, every presumption is to be made that he did not intend to die intestate."

Of qualified and temporary interests in chattels.

This seems a proper place to introduce some observations on those bequests of chattels which create qualified and temporary interests in them, followed by gifts over to others in succession. In the consideration of which subject, it should be distinctly understood that a strict legal remainder can only be limited of freehold estates. Every bequest of personal estate to take effect *in futuro*, whether it be after a preceding bequest or not, or limited on a certain or uncertain event, takes effect only as an ex-

ecutory disposition. Every future bequest of this description of property falls under that class of dispositions called executory devises, and is subject to the rules and restrictions affecting the same.

At common law, if a personal estate was devised to one for life, or otherwise, and after the decease of the devisee or legatee, or on the happening of any other event, certain or uncertain, the same was given over to another, such limitation over was void, and the whole, in strictness of construction, vested in the first taker. To avoid this inconvenience, and the disappointment of the testator's intention, a difference was made between the bequest of the *use* of a thing, and of the thing itself\*. All difficulty, however, on this subject has long ceased to exist; and these limitations or gifts of ulterior interests in personal estate have for some centuries had their full operation as executory devises, or rather *bequests*. Thus, where a term is given to one for his life, remainder to another after his decease, this limitation is considered as not meant to take effect as a remainder, but, upon the principle of *ut res magis valeat quam pereat*, such limitation or gift over is regarded as a substantive devise to take effect upon the death of the person first named, or other event, certain or uncertain, and is considered as preceding the intermediate disposition: so that it is the same as devising a chattel interest in land to one man upon his paying a sum of money to executors, or upon the death of another, which makes it a proper executory devise; and after limiting which future interest, the testator is still at liberty to dispose of the estate in the mean time.

At common law no remainder of personal estate could in strictness be limited.

\* Bro. Dev. pl. 13. Cro. Ca. 341.

Thus in *Lampett's case* in *Cooke's Reports*<sup>a</sup>, where a testator, being possessed of a messuage for a term of years, devised the same to his father for the term of his natural life, remainder, after his father's decease, to his sister and the heir of her body, it was resolved that the limitation to the sister was good as an executory devise. And in other cases where the ulterior disposition has depended upon an uncertain event, or been made in favour of a person not in being at the time, it has been supported upon the same principle<sup>b</sup>.

The doctrine above attempted to be explained is equally applicable to mere bona mobilia, in courts of Equity. It has long been settled, that a bequest of goods to A. for life with remainder after his decease to B. is a good bequest to B.; who formerly might file his bill against the legatee for life, to compel him to give security for the goods being forth-coming at his death<sup>c</sup>; but the later practice is, for the devisee for life to be required to sign an inventory, to be deposited with the Master for the benefit of all parties, which Lord Thurlow has observed to be more equal justice, as there ought to be existing danger to justify the requisition of a security<sup>d</sup>.

*Of the dominion accompanying the interest for life in a personal chattel.*

Very little is to be found in the books respecting the extent of enjoyment or dominion acquired by the person taking under a will the estate or interest for life in a personal chattel. In one case<sup>e</sup> it was held,

<sup>a</sup> 10 Rep. 46. see also 8 Rep. 95. *Matthew Manning's case*.

<sup>b</sup> See 1 Roll. Abr. 612. 1 And. 60, 61.

<sup>c</sup> See 2 Freem. 206. 1 P. Wms. 1.

<sup>d</sup> 1 Bro. C. R. 279. 3 P. Wms. 336. 2 Atk. 82, 321.

<sup>e</sup> *Marshall v. Blew*, 2 Atk. 217.

that a devise from a husband to his wife of the use of household goods, furniture, plate, jewels, linen, &c. for life or widowhood, and afterwards to children and grandchildren, included an authority for the wife to use the goods in her own, or in any other person's house, alone or promiscuously with other goods, or even to let them out to hire. Mr. Fearne has observed, in treating incidentally on this point<sup>f</sup>, that in *Marshall v. Blew* it did not appear that the goods and furniture were annexed as heir-looms, to go along or be enjoyed with any house; but that such an annexation of them to the possession of any particular dwelling house might probably have excluded the liberty of using them, or letting them to hire, *separately*, or otherwise than with the house on which the limitation of the goods was so attendant. Mr. Fearne, however, was of opinion that even where the furniture was directed to go with the house in the nature of heir-looms, it would be competent to the person having the life-interest, to let such furniture together with the house, grounding himself, in some measure, on the case of *Cadogan v. Kennet*<sup>g</sup>, where, though the possession of the goods was connected with the house under the trusts, and a particular of them was annexed by way of schedule to the settlement, yet it was admitted that the husband who takes an interest under the trusts in the same for his life, might have let the house and furniture together.

There are many subjects of testamentary disposition of which it may be said *usu consumuntur*; and where such are bequeathed to a legatee with a particular interest in them, as for his life only, some other person being appointed to succeed him in the pro-

As to consumable things.

<sup>f</sup> See *Ex. Dev.* 6th Ed. by Butler, 407.      <sup>g</sup> Cowp. 432.

perty, many niceties and distinctions may arise in reference to the nature of the thing given. Where things are at once unproductive and consumable, the use of them implies the destruction of them, and this will always be the case with consumable dead stock : but in respect to live stock, it is observable that though the individual thing is destroyed, the species still continues to exist, and the race is continually propagating : it may therefore be a question whether the legatee for life be not bound to keep up the stock for the benefit of his successor in interest, subject to the reasonable use and consumption of the produce. In the above cited case of *Porter v. Tournay*<sup>h</sup>, it was observed by the Master of the Rolls that “ there had been great doubt among the judges, what a person having a limited use of such articles may do ; some learned judges had thought they must be sold, and that a person so entitled was to have only the interest of the money produced by the sale ; but that was a very rigid construction.” I am not aware of any more recent decision whereby these peculiar difficulties have been removed. One should certainly advise a person claiming such determinable interest, to govern himself by the fair and equitable principle of taking only a reasonable and proportionate use and enjoyment, and preserving the thing bequeathed, as far as might be consistent therewith, for the benefit of his successor under the will ; in all cases ascertaining the quantity, number and kind, by a proper inventory or account.

As to the  
remedies  
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Where, by the dispositions of a will or settlement the possession of furniture and household goods are

annexed, in the nature of heir-looms, to the possession of the mansion itself, such goods will not be suffered to be separated from the house by an execution against a person taking an estate for life under such will or settlement. If such will or settlement has vested in trustees, the legal estate in the house and goods so settled together, the legal remedy will reside with such trustees for enforcing restitution, or recovering the value; and thus in the case of *Cadogan v. Kennet*, above cited, upon an action of trover brought by the trustees to whom the *possessio legalis* belonged, for the benefit of the husband and wife and the sons of the marriage in succession, Lord Mansfield observed that it was a settlement very common in great families: in wills of great estates nothing was so frequent as devises of part of the personal estate to go as heir-looms: so in marriage settlements it was very common for libraries and plate to be so settled, and for chattels and leases to go along with the land. If the husband grew extravagant there never was an idea that these could afterwards be overturned: if that court were to determine they should, the parties would resort to chancery. It was the business of the trustees to see that the goods were not removed: the creditors had no right to take the goods themselves: the possession of them belonged to the trustees: the absolute property of them was then vested in the eldest son, and they were to be kept in the house for his benefit. (3)"

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(3) The question whether that settlement was or was not void as against creditors, under the statute against voluntary and fraudulent conveyances, was a branch of the case, which, though of considerable interest, is not connected with our present inquiry, and has been discussed at large in the treatise on voluntary and fraudulent conveyances.

In the case of *Foley et al. v. Burnell*<sup>1</sup>, Lord Foley had devised his house called F. to trustees for a term of 99 years, and subject thereto, to his son T. for life, remainder to his first and other sons with remainder over, and bequeathed "all the standards, fixtures, household goods, implements of household furniture and pictures, gold and silver plate, china, porcelain, &c. which should be in the several capital messuages, called S. W. and F. to be held and enjoyed by the several persons, who from time to time should successively and respectively be entitled to the use and possession of the same houses respectively, as and in the nature of heir-looms, to be annexed to and go along with such houses respectively for ever." Upon the testator's decease the trustees, who were also executors of the will, permitted the eldest son to occupy the house called F. and to use the wine, linen, and china which was in it at the death of the testator. Upon those articles being taken in execution at the suit of a creditor of the son, the trustees and executors, after having demanded them, brought an action of trover, and had a verdict for the amount of the articles so taken in execution.

Mr. Fearné in his comments on this last mentioned case, with his usual sagacity, suggests a doubt whether, as the property comprised in the heir-loom clause was not in this case devised to the trustees, but seemed only to have vested in them as executors, their consent to the possession by the first cestui que trust as legatee thereof did not divest them of the legal estate, and pass it to the legatees under that clause according to their respective interests under the will,

<sup>1</sup> Cowp. Rep. 435. n.

and so disqualify them for the recovery of the goods by legal process. The same writer, however, was of opinion that if the legal remedy had failed on that ground, the legatees might still have found a resource in Equity. And he conceived himself to be supported in that opinion by the arguments of the court in another case under the same will, in which the legal estate and interest in the chattels devised was clearly in the first taker<sup>k</sup>. The Lord Chancellor, in considering the relief in the case last adverted to, put the case of a bequest of a chattel interest to one for life, remainder to another in tail, in which, he said, the ulterior devisee might come to the court to prevent the destruction of the subject. Which case, Mr. Fearne observes, as well as the common instance of trustees for preserving contingent remainders being allowed to maintain an injunction from waste against tenant for life of the legal estate, seems to warrant the interposition of the court, for the benefit of the persons intitled after a temporary antecedent interest in the first taker, notwithstanding the interest of such first taker be clothed with the legal estate.

But it appeared to Mr. Fearne, to be a very sufficient ground for the equitable relief, that executory dispositions of *chattels personal* appear to have been originally founded in, and still to rest on the doctrine of courts of Equity; and that if so, there could be no obstacle to the interference of those courts in the regulation of interests, created by, and dependent upon their own jurisdiction.

In chattels *real* the law has long admitted a division

<sup>k</sup> *Foley v. Burnell et al.* 1 Bro. C. Rep. 274.



of the interest between the devisee for life, and those in remainder; but the division of the interest in chattels personal between tenant for life, and those to whom they are limited over, seems yet to be a matter of equitable cognizance, resting upon the execution of a court of Equity in specie. And such a specific apportionment and execution of the rights of the parties would be frustrated if the court could not secure the specific chattels themselves, in the mean time, against such a disposition of the first taker, and all claiming through or under him, as would endanger its existence or preservation.

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## SECTION II.

### *As to immoveable things.*

Leaseholds not, in general, included under a general devise of lands.

IT is a general and established proposition that where a man is possessed of freehold and leasehold property, the leasehold will not pass by a general devise, applicable to freeholds, unless an intention to include leaseholds under those words can be collected from the face of the will, or from the nature or situation of the leaseholds themselves. The great and fundamental case upon this subject is *Rose v. Bartlett*<sup>a</sup>, determined so long ago as the beginning of the reign of Charles I. It was there resolved that if a man have

<sup>a</sup> Cro. Car. 292.

lands in fee, and lands for years, and devise all his lands and tenements, the fee-simple lands pass only, and not the leases for years; but if a man have a lease for years and no fee-simple, and devise all his lands and tenements, the lease for years passes; for otherwise the will would be merely void. The rule has prevailed notwithstanding some expressions have been used by a testator which might seem to have been adopted on account of their applicability to chattel interests. Thus in the case of *Davis v. Gibbs*<sup>b</sup>, where the words were “manors, messuages, lands, tenements, hereditaments, and real estates whatsoever, of which I am any ways seised or intitled to,” the rule laid down in *Rose v. Bartlett* was adhered to, and the same point was decided in the same way by Lord Mansfield in *Pistol on dem. Randal v. Richardson*<sup>c</sup>, in which the testator devised “all and every of his several lands, messuages, tenements, and hereditaments whatsoever and wheresoever, whereof he was seised, and *interested in*, or *intitled to*” to his son for life, remainder to the heirs of his body; and afterwards devised his personal estate to his wife and daughter, and made his wife sole executrix. The question was, whether the leasehold lands by the above words of the will were given to the son, or were part of the personal estate. After two arguments Lord Mansfield delivered the opinion of the court, “that the leasehold lands did not pass to the son, but were part of the personal estate” (1). The

But if the testator leaves more but leaseholds to answer the disposition, they will pass.

<sup>b</sup> Fitzg. 116. 3 P. Wms. 26.

<sup>c</sup> 1 H. Bl. 26, note.

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(1) If a man, having both freeholds and leaseholds, devise all his lands and tenements, by a will unattested, as the statute directs, so that it is inoperative in respect to the freeholds, still the words *If the will is ineffectual to pass free-*

case of *Addis v. Clement*<sup>d</sup>, indeed, which was decided the other way, expressly proceeded in part on the effect of the words, "whereof he, the testator, was seized or possessed, or interested in," and it was lamented by Lord Kenyon, in *Lane v. Lord Stan-*

<sup>d</sup> 2 P. Wms. 455.

hold for want of due execution, this will not make the leaseholds pass by a general devise, applicable to freehold estate.

of the devise are held not to pass the leaseholds. This was one of the points in *Chapman v. Hart*<sup>\*</sup>, determined by Lord Hardwicke, where a testator devised all his lands at or near Fowey to the plaintiff, and the will was executed in the presence of two witnesses only. The Chancellor observed, that it was not certain whether the testator had any leasehold in or near Fowey. If there should appear to be both, and the law had been with the plaintiff, so that she should be entitled thereto, it would be a ground for the direction of an enquiry; for the answer was not a positive negation of any leasehold. But if, let the fact come out how it would, the law was against the plaintiff, he ought not to direct an enquiry. And he was of opinion, that though it should appear that the testator had leasehold as well as freehold, the plaintiff would not be entitled. His Lordship supposed a case of a person seised of freehold and copyhold in D. who surrendered to the use of his will, and devised all his lands and tenements in D. to his child: there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds: but if no surrender to the use of the will, only the freehold would pass; to which lands and tenements generally mentioned should be applied; there being no surrender to the use of the will, to shew a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used; and no surrender: though this were to a child or wife, the court would not supply the defect of the surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will was not duly executed; when, if duly executed, the court would not have supplied that defect: for such variation of the construction would be very dangerous.

<sup>\*</sup> 1 Vez. 271. and see *Streatfield v. Streatfield*, Talb. 175.

hope<sup>a</sup>, that that case was not cited in *Pistol v. Richardson*, since his Lordship thought that if Lord Mansfield had had it in his view he might have been induced to decide otherwise than he did. But it seems from a manuscript note of *Pistol v. Richardson* that the case of *Turner v. Husler*<sup>f</sup>, which proceeded on the authority of *Addis v. Clement* was noticed by Lord Mansfield in his judgment, who received his account of it from Mr. Baron Eyre<sup>e</sup>.

Lord Eldon in the case of *Thompson v. Lady Lawley and others*<sup>h</sup>, seemed evidently to think that too much stress might be laid upon these words, “possessed of, or intitled unto.” But his Lordship took notice of the other ground of the decision in *Addis v. Clement*, viz. that the 21 years lease in that case was held of the church, and always renewable, so that the lessee, who was the testator, might look upon himself, from the right he had to renew, as having a perpetual estate therein—a kind of inheritance; and appeared to think *that* an ingredient which sufficiently distinguished the case from *Pistol v. Richardson*.

The distinction taken in *Rose v. Bartlet* as to the effect of a will devising “lands and tenements” upon leasehold property, where there are no freeholds to satisfy the words, was fully confirmed by the case of *Day v. Trig*<sup>i</sup>, where, upon a devise by a testator, of all his *freehold* houses in Aldersgate-street, to the plaintiff and his heirs, having

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<sup>a</sup> 6 T. R. 353. <sup>f</sup> 1 Br. C. C. 78. <sup>e</sup> See 2 Bos. et Pull. 306.

<sup>h</sup> 2 Bos. et Pull. 303.

<sup>i</sup> 1 P. Wms. 286.

in fact no freehold houses, but only leasehold houses, in the place described; it was decreed by Mr. J. Tracy, sitting for the Lord Chancellor, that, though in a *grant* of all one's freehold houses, leasehold houses could not pass; and though, even in the case of a *wife*, had there been any freehold houses to satisfy the words, leasehold houses should not have passed, yet the plain intention being to pass some houses, and he having no *freehold* houses in the place mentioned, the word *freehold* should rather be rejected than the will be wholly void, and the leasehold should pass (2).

And under an express devise of leasehold, freehold may pass, if such appear to be the intention.

As by the case last cited it appears that the insertion of the word '*freehold*' by the testator, will not prevent the passing of *leasehold* property, where the intention to pass them is manifest upon the whole will; so in a late case it has been ruled in the court of King's Bench, that under the phrase *personal* estates, real property may pass, if it is clear from the bearing of the instrument, that such was the testator's intention<sup>k</sup>; and where by a will giving the estate a local description and a name, the property was mistakingly called leasehold, the testator's freehold was held to pass, there being no other property answering the name and description<sup>l</sup>.

So, by the word legacy a devise of freeholds may be understood.

On the same principle of giving words a descriptive effect, commensurate with the clear intention of the parties, whatever may be their primary or

<sup>k</sup> Doe on dem. of Tofield v. Tofield, widow, 11 East, 246.

<sup>l</sup> Doe d. Wilkins v. Kenneys, 9 East, 366.

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(2) He observed also that the suit was proper in equity, since the leasehold houses (being chattels) could not pass by the will without the assent of the executor, which assent he was compellable to give in equity.

strict sense, the word 'legacy' has been construed as comprehending real estate. Thus, where A. by will gave two legacies of 150*l.* each to his son and daughter, to be paid at 21, and then gave all his realty and personalty to his wife for life, and after her death, one freehold estate to the son, and another to the daughter; but if either or both his children should die before the wife, then those *legacies* which were left to them should *return* to the wife; it was held that on the death of the son before the mother, the mother was entitled to the reversion of the freehold estate, the word 'legacy' not being necessarily confined to the pecuniary bequests, where by the context of the will it appeared to have been used by the testator in a larger sense<sup>m</sup>.

Whether, where there has been a surrender to the use of the will, the general words 'messuages, lands, tenements, and hereditaments,' will pass copyhold as well as freehold estate, without any inference furnished by the will itself, of the testator's intention to include both, seems to rest in some doubt. In the case of *Doe d. Belasyse v. the Earl of Lucan*<sup>n</sup>, none of the judges appeared to hold any decided opinion on the point. That case, however, has completely established the doctrine that wherever the intention of the testator to devise his copyhold can be collected from the will, and the words, though they make no mention of copyhold, are large enough to comprehend it, and a proper surrender has been made to the use of the testator's will, such copyhold will pass to the devisee. And we may safely infer from the principles

Whether  
copyhold  
passes by  
the general  
devise of  
lands, &c.

<sup>m</sup> *Hardacre and another v. Nash and another*, 5 T. R. 716.; and see *Hope d. Brown v. Taylor*, 1 Burr. 268.

<sup>n</sup> 9 East, 448.

of the last-mentioned case, as well as from others, that, where the testator's freehold will not satisfy the description, or the purposes expressed in the will, unless the copyhold be considered as included in the devise, the intention to devise the copyhold is sufficiently indicated.

The case last adverted to was to the following effect. The testator, having a freehold manor of Sutton, and freehold lands there, and having also copyhold lands within the township of Sutton, and within the local ambit of the manor, but held of another manor, and having surrendered his copyhold to the use of his will, devised all his manor of Sutton, and all his messuages, farms, lands, tenements, and hereditaments, whatsoever, within the precincts and territories of Sutton, in the county of Chester, with their rights, members, and appurtenances, in trust for his daughter, and to her children in strict settlement; and first, it was held that farms, lands, &c. within the township, though not within the manor of Sutton, passed by the description of farms, lands, &c. within the precincts and territories of Sutton. Secondly, that the general words of 'messuages, farms, lands, and tenements,' and particularly the word 'farms' (3) were sufficient to carry copyhold as well as freehold in the place described, if such appeared to be the intent of the testator upon the whole will; and, thirdly, that such intent was to be inferred in the case before the court, as it appeared that the testator had within the place

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(3) Lord Ellenborough observed that the word 'farms' at least would include copyhold as well as freehold.

described, a farm composed of copyhold and freehold, which he had let as one entire subject, and also by his having charged the property devised beyond the annual income of it, unless the copyhold were included. It was held clearly, that another small copyhold at the distance of about eight miles from Sutton, and not in the same county, passed by the residuary clause, whereby the testator devised all the *rest, residue, and remainder of his real and personal estate*°.

The cases on this subject, which are of frequent occurrence in equity, have arisen upon the usual resort to that forum to supply the defect of a surrender, which it will only do for the sake of three descriptions of persons<sup>°</sup>, creditors, wife, and children: of which three classes the courts of equity shew the greatest favour to creditors; for neither the wife, or younger child, will have the defect of a surrender supplied for them, if the heir at law (being a child of the testator) would be thereby left unprovided for. If the will devises the copyhold in terms, and for the benefit of any of the above-mentioned favoured objects, equity will supply the want of a surrender, and give effect to the express intention of the testator; but where the words are general, as ‘messuages, lands, tenements, and hereditaments,’ and such surrender has been wanting, the cases have for the most part shewn a reluctance to

Of the doctrines of equity on this subject.

° See the case of *Doe d. Pate v. Davy*, Dougl. 716. note (2), and see the cases in 6 Vin. Abr. tit. copyhold, 236-7.

° *Goring v. Nash*, 3 Atk. 189. *Goodwin v. Goodwin*, 1 Vez. 228. *Byas v. Byas*, 2 Vez. 164. *Tudor v. Anson*, 2 Vez. 582.; and see Mr. Coxe's note to *Watts v. Bullas*, 1 P. Wms. 60.



consider copyhold included in those words, without some ground of necessity for such construction. Thus in *Hazlewood v. Pope*<sup>1</sup>, Lord Chancellor Talbot held that "if a man devises all his lands, tenements, and hereditaments, in Dale, in trust to pay his debts and legacies, and the testator has some freehold and some copyhold lands there, only the freehold lands shall pass, for his will must be intended of such lands and tenements as are devisable in their nature. *Secus*, if the testator had surrendered his copyhold lands to the use of his will, because this shews he did intend to devise his copyhold. But even in the first case, i. e. where there had been no surrender to the use of his will, when the testator devises all his lands to pay his debts, it seems rather than the debts should go unpaid, that the copyhold shall in equity pass."

It is clear from the above expressions of the Chancellor, that the difficulty lay in giving to the general words the effect of passing copyholds, without a strong necessity for such construction, where the copyhold had not been previously rendered devisable by a surrender to the use of the will; considering the fact of the omission or observance of this ceremony as being a strong circumstance of inference with respect to the testator's intention.

That this was likewise Lord Hardwicke's view of the subject may be collected from the case of *Goodwyn v. Goodwyn*<sup>2</sup>, where his Lordship observed, that it had been in several cases held that a devise in general words of all lands and tenements will not comprise copyhold lands, which have not been surrendered to

<sup>1</sup> 3 P. Wms. 322.      <sup>2</sup> 1 Vez. 226.

the use of the will so as to shew an intent to comprise them. And where, continued the same Chancellor, the intention of the testator of raising portions or payment of debts may be answered by freehold lands, the court will not suppose he intended to pass copyhold. In that case the copyhold had been surrendered to the use of the will, and the general words being considered as comprehensive enough to include them, it was adjudged to be included in the devise. His Lordship, in a case\* which came before him a few months afterwards, adverted to the same doctrine in the following words. "Suppose a case, (which though I do not know to be determined, I should not doubt to determine so,) of a person seised of a freehold and copyhold in D. who surrenders to the use of his will, and devises all his lands and tenements in D. to a child; *there being a surrender*, both freehold and copyhold would pass; but if no surrender to the use of the will, only freehold would pass."

It does not seem, therefore, that the courts formerly considered the general words *messuages, lands, tenements*, and *hereditaments*, of force per se to carry copyhold estate, and the reason appears to have been, that copyholds being not in their own nature devisable, these general devising words were not, prima facie, applicable to them. It was always considered that there must be something to manifest an intent to pass them. If, therefore, the surrender to the use of the will was wanting, and there was a general devise of the lands, &c. in favour of the testator's wife or child, equity though disposed to supply the defect of the surrender in behalf of these favoured objects, could not see in these

Whether the general words *lands, tenements*, and *hereditaments*, are alone sufficient to pass copyhold estate, without any special circumstances to indicate the intention.

\* Chapman v. Hart, 1 Vez. 272.

*general words* the intention to pass the copyhold at all, if there was any freehold estate to answer the words of the will.

But if the devise was for the purpose of paying debts, and the freehold was not enough to answer that highly favoured object, equity supplied the surrender in behalf of the intention inferred from the necessity of the case, though the devise was only in the general terms above-mentioned. Still, however, it is said that equity will supply the want of the surrender *so far only* as may appear *necessary* for the payment of debts; and, therefore, it has been held, that while any freehold estate remained applicable to that purpose, the want of the surrender of the copyhold should not be supplied<sup>1</sup>. And this has been even held to be so, notwithstanding the express intention of the testator to charge the copyhold rateably with, or in preference to, the freehold.

Where there was a surrender to the use of the will such surrender appears to have been considered as at once opening a way for the copyhold into the will, and affording a ground for inferring an intention in the testator to pass it by his will; and having got so far, the only enquiry was, whether there were words in the will capable, in point of legal compass, of embracing copyhold estates, as doubtless the general words, 'lands, tenements, and hereditaments,' must be admitted to be.

This would be giving great effect to the act of sur-

<sup>1</sup> *Mallabar v. Mallabar*, Cas. Temp. Talb. 78. *Combes v. Gibson*, 1 Bro. C. R. 273, *Hellier v. Tarrant*, Ca. Temp. Talb. 3d. ed. 288. (note).

rendering, and might if once so settled save a great deal of trouble: but it seems as if it would be travelling faster than the cases to rely on such a doctrine. In the late case of *Doe and Belasyse v. the Earl of Lucan* above stated, Lord Ellenborough said he should proceed merely on the testator's intention as he collected it from the face of the will; saying he was afraid to look at any argument of intention to be derived from the surrender to the use of the will, though, perhaps, it might be proper to be regarded even in that court, as it certainly would be in another court, but that it was not necessary for him to give any opinion upon that point; he professed to determine the case upon the intention as collected from the words of the will only.

Upon the whole it must be considered as resting in some uncertainty whether, and how far, the fact of a surrender to the use of the will affords inference of intention; and, supposing no special ground for inferring intention, whether the general words, "lands, tenements, and hereditaments" in a will, to the use whereof a surrender has been made, are of force per se to carry copyhold estate. But thus much is certain, that where these words occur in a devise, and a surrender of copyhold has been previously made to the use of the will, the copyhold will pass, if an intention to pass it, can be collected from the context of the will.

The word *copyhold* is not always necessarily confined in a will to that which comes strictly within its meaning. Thus in a late case<sup>a</sup>, a customary estate,

*Copyhold, will pass customary estates.*

<sup>a</sup> *Cook and Cook v. Danvers*, 7 East 299.

parcel of a manor, demisable only by the licence of the lord, and passing by surrender and admittance, whether strictly copyhold or not, was adjudged to pass under the description of a copyhold in a will, the intention being apparent. (4) And, indeed, where the intention is apparent from the context of the will itself, the specific and technical meaning of words needs scarcely any longer be a subject of enquiry, after the cases which have decided that legacy, or personal estate, may be descriptive of a real devise, or of real property, if it is clear that such was the meaning of the testator.

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(4) But it should seem that upon a broader ground than any evidence of *particular intent* the word copyhold in a will ought to be considered as including customary estates held of a manor, and demised and demisable by copy of court roll, although not copyhold in the stricter sense. It is thus that Lord Ellenborough has expressed himself on the subject in the case of *Roe and Conolly v. Vernon and Vyse*, 5 East. 83, 84. "In disposing of their property testators usually advert to the known and ordinary circumstances attending it, and adopt the appellations by which it is generally and more familiarly distinguished. They cannot be supposed to regard or consider those equivocal or less obvious qualities of their estates, about the effect of which profound lawyers and legal antiquaries might entertain controversies. The distinction between estates which may be immediately transferred from man to man by deeds and instruments executed merely between the parties themselves, and those estates the titles to which are evidenced by copies of the rolls of the courts baron, are familiar to men the least acquainted with the rules of property; but the distinction, and still more the effect of the distinction, between tenants by copy of court roll at the will of the lord according to the custom of the manor, and tenants by copy of court roll simply according to such custom, as determining the one to have a freehold interest, and the other not, is a distinction not at all likely to occur to persons in general when disposing of their property."

In the above-mentioned case of *Haslewood v. Pope*\*, Lord Chancellor Talbot made a doubt, whether, if a man have lands, and also a *manor* in Dale, of which the lands are not parcel, a devise of the lands would include the manor; but he seemed clear that it would pass under the word *hereditament*, and there can be as little doubt that the word *tenement* would embrace it.

What words include a manor.

The same may be said of an *advowson*, (5) which in *Westfaling v. Westfaling*\* was clearly held to pass by the word *tenements*† or *hereditaments*‡, but not by the word *lands*. But supposing the devise to have been of *lands*, at a particular place, and that the testator had nothing but a manor, or an advowson, to answer the devise, rather than that the will should be inoperative, it seems to be the better

And advowson.

\* 3 P. Wms. 322.

\* 3 Atk. 460.

† Hob. 303.

‡ Dyer, 323. pl. 30.

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(5) It appears doubtful whether the word *advowson* will carry an appropriation of it. Hob. 304. But by the devise of an advowson the next turn or presentation inclusively passes, even though the devisor himself is the incumbent. 1 Atk. 619. And there is no doubt but that the next turn or presentation is a proper subject of devise, vid. *Law v. Bishop of Lincoln*, 2 Blackst. 1240. though if the presentation falls in the life of the testator, the devise must of necessity fail. Nor does it seem that after avoidance, the right to present is strictly devisable, being in the nature of a chose in action. It is held, however, that if the incumbent is also the patron, he may devise the next turn or presentation; for although at the very instant of the death the church becomes void, yet the testament is regarded as having an inception in the life time, which secures its operation at the moment of the death. *Harris v. Austin*, 3 Bulst. 36. 1 Roll. Abr. 210. *Cro. James* 371.

opinion that the manor or the advowson would pass<sup>a</sup>. So in the case of *Ritch v. Sanders*<sup>b</sup>, where a testator gave all his free lands wheresoever, to his brother John Sanders for life, upon condition that he suffered the testator's wife to enjoy all his free lands in Holford for life, the testator having only a portion of tithes of inheritance, in Holford, and no lands, the word "lands" was held to extend to tithes, though an incorporeal hereditament, and collateral to the land.

*Lands include houses.*

But *lands*, ex vi termini, will pass *houses*, so that if a man having both lands and houses in Dale, devise all his lands in Dale, his houses will pass to the devisee<sup>c</sup>.

*What passes by the word manor.*

By the demise of a *manor*, the manor passes together with all the demesnes and services, so that if after such devise a copyhold, parcel of the manor, escheats to the lord, it undoubtedly passes by the will<sup>d</sup>. In strictness the soil and inheritance is in the lord, and the copyholder is only a tenant at will; so that under a devise of a manor, copyhold premises, parcel thereof, subsequently purchased by, and surrendered to, the lord, will pass<sup>e</sup>.

*What passes under farm.*

The word *farm*, as importing all such premises as have been usually let together, and comprehended within one entire holding, has always been considered as carrying the whole premises, where the

<sup>a</sup> Vid. 3 P. Wms. 322.

<sup>b</sup> Style, 261.

<sup>c</sup> *Ewer v. Heydon*, Moor, 359. pl. 491. and see Godb. 352. pl. 447.

<sup>d</sup> *Bunter v. Cooke*, 11 Mod. 129. Salk. 238.

<sup>e</sup> *Roe d. Hale v. Wegg and Others*, 6 T. R. 708.

same have consisted of different descriptions of estate; and this, although the word has been associated with other terms, descriptive in their ordinary sense of freehold property only, and the testator has died seised of freehold estate sufficient to satisfy the prima facie import of the words. Thus, where A. being seised of several freehold estates, and possessed of part of a *farm*, held by a church lease, renewable, (the other part of the farm being freehold, and the whole having been always let together, as one entire farm, at one rent,) devised "all his manors, messuages, houses, *farms*, lands, woodlands, hereditaments, and real estates whatsoever," to B., and gave "all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever" to C.; it was clearly held that the leasehold part of the farm (6) passed under the first devise<sup>f</sup>.

<sup>f</sup> *Lane v. Earl Stanhope and Others*, 6 T. R. 345.

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(6) Unity of possession is always a strong argument of intention to include the subjects so held together, under one and the same devise, even where the word *farm* does not occur in the will. As in the case of *Roe d. Pye v. Bird*, 2 Blackst. 1301. where a testator devised all his estate in A. having copyhold and leasehold there which had been purchased together, and afterwards occupied together for twenty-three years; the devise was held to include both the leasehold and copyhold, as one consolidated estate, though there was in the same will, a bequest by the testator, of all his personal estate to another. And so, where a man devised his freehold and copyhold messuages, lands and tenements to A.; under this devise the plant of a brewhouse was held to pass with the brewhouse itself, having been tenanted together, although there was a bequest of the personal estate to another. See *Wood and Wife, v. Gaynon and Wife and others*. Amb. 395.



Thus also, in an earlier case, where a testatrix had devised to A. an entire *farm* in the occupation of one of her tenants, which included a small parcel of marsh lands ; this parcel of marsh lands was held to pass, together with the *farm* to which it was attached, notwithstanding there was in the same will a devise of all the testatrix's marsh lands to another person, she having a large estate in marsh lands besides, which was let together to another tenant<sup>5</sup>.

*Message*  
—what it  
may in-  
clude.

The word *message* has also been carried by construction to the same extent. Thus in a case where the testator devised his three messuages, with all houses, barns, stables, stalls, et cætera, that stand upon or belong to the said messuages, and the question was, whether the lands and meadows which were held with the messuages, would pass by the will ; the Court, after saying that the intention of the testator was the polar star to direct them in the construction of wills, observed, that the testator had clearly manifested his intention to dispose of his whole estate, by the introductory words, which were, “ As touching such worldly estate wherewith God hath blessed me, I give, &c.” The Court also laid great stress upon the fact of the testator's having purchased the whole estate together, both messuages and lands, a short time before he made his will. They thought it clear from all circumstances, that the lands and meadows, as well as the houses, were meant to pass by the devise; as one entire farm, as much as if the testator had said, “ I give and devise all that my *farm*, with the appurtenances which I purchased of A. B.” which,

<sup>5</sup> Holdfast d. Hitchcock v. Pardoe, 2 Blackst. 975. and see Doe d. Belasyse v. the Earl of Lucan, 9 East 448.

without doubt, would have passed the whole, both messuages and lands<sup>b</sup>.

Notwithstanding the different construction given to *messuage*, and *house*, in many of the early cases, the Court in the case of *Doe d. Clements v. Collins*<sup>1</sup>, seemed to think the distinction had been carried too far. There, A. being tenant for years, of a house, gardens, stables, and coal-pen, made the following bequest, "I give the house I live in, and garden to B." And it was held that the stables and coal-pen occupied by A. together with the house, passed without being expressly named, though the testator used them for the purposes of trade, as well as for the convenience of the house.

*House—  
what it  
may in-  
clude.*

But no case has gone so far as to say that the word *house* alone, is capable of receiving from evidence of intention such an enlargement of its sense as to pass lands in a will. In the case of *Doe d. Walker, v. Walker*<sup>2</sup>, the argument from intention was much pressed, but the Court considered that to supply the word "lands" would be to supply an absolute omission in the will, of which they said they never knew an instance. The case was shortly this. A testator devised to his wife his house and goods, with all his lands, goods, and chattels whatsoever and wheresoever, for her life; and after her death to two younger sons, till they should attain the age of fifteen, for their education. He then devised his aforesaid house, goods, and chattels, equally to be divided between all

<sup>1</sup> *Gulliver d. Jeffereys v. Poyntz*, 3 Wils. 141. And see the cases collected in Hargrave's notes to Co. Litt. 5 b. note 21.

<sup>2</sup> 2 T. R. 498.

<sup>3</sup> 3 Bos. et Pull. 375.

his sons and daughters, share and share alike ; and it was determined that under the last clause of the devise, the lands did not pass. There is a case, however, in *Peere Williams*<sup>1</sup>, in which, by force of the general intent deducible from the dispositions of the will, land was held to pass without any other descriptive word besides his (the testator's) *house* at C. The testator directed that his cousin, Anne Edgley, should continue to live at his house at C. and that her son, H. E. should continue to live with her there in the same manner as he then did with the testator ; that the said Anne Edgley should be at all the charge of house-keeping, servants' wages, and coach horses, to the number that he maintained. The testator was seised in fee of some little *land*, by him always employed for producing hay and corn which was constantly spent in the house, and the land was ploughed with the coach horses which the testator kept. Upon this will and these circumstances the court reasoned that the intention of the testator was, that after his death, and during the life of his kinswoman Anne Edgley, every thing should be carried on and transacted as it was in his life time, and that to such a nicety, as that the same number of servants, and even of coach horses was to be employed, the same hospitality observed, and the same horses used in ploughing the lands ; which could not be, unless the lands were to continue as before to be enjoyed with the house : therefore, as it seemed to have been his intention not to part with them, it was decreed that those lands which had before been constantly enjoyed with the house, and the profits whereof had been applied to the maintenance of the house, should continue to be so enjoyed.

<sup>1</sup> *Blackburn v. Edgley*, 1 P. Wms. 600.

There is less difficulty in construing land to pass with a house, where the word *appurtenances* is added. Thus in *Doe d. Lampriere, v. Martin*<sup>m</sup>; land occupied with a house, and highly convenient for the use of it, was held to pass in a will by the word *appurtenances*, though the land in that case was held for a different term.

Of the effect of the word *appurtenances*.

In the last cited case the devise was of "all the testator's copyhold messuage, with all out-houses, gardens, and *appurtenances* to the same belonging, situate at Fulham, and then in his possession." And the land in question was the site of some cottages, which the testator had lately pulled down for the purpose of taking the ground on which they stood into the courtyard of the house, so that his plain meaning was to unite these parcels together, and to devise all that he personally occupied.

From the reasoning of the case it appears, that the land was considered as included in the word *appurtenances*, for the sake of giving effect to the manifest intention of the testator, as it appeared by the context of the will itself, assisted and explained by extrinsic evidence; which seems to be a sufficient ground for extending the import of the word *appurtenances*, or any other word of description in a will. But it may be observed that that word in its strict technical sense has been held to extend to the buildings, curtilage, and garden, belonging to a house, and the court-yard seems to be part of the curtilage.

But *appurtenances* will not ex vi termini compre-

hend land, although usually occupied with a house, but only such land or ground as is immediately connected therewith, and necessary to the commodious enjoyment of it. If it is to be carried beyond this, so as to include lands, such extension of its sense must be a consequence of the principle of giving effect to the general plain intent of the testator. Thus in *Buck and Whalley v. Nurton*<sup>a</sup>, where in the will of the testator was the following clause: "And it is my express will and desire, and I do hereby direct that the said John Nurton shall hold and enjoy my said capital mansion-house, with the *appurtenances*, for the space of one year after my death." In another part of the same will the testator had devised "All that his capital mansion-house wherein he then lived, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the *appurtenances*."

The testator was possessed of a mansion-house, together with several parcels of land, amounting to 64 acres, and there were also extensive gardens and pleasure-grounds, together with walks and ways attached to the house. The question was what parts of the premises passed to John Nurton by the clause which directed that he was to have the mansion-house with the *appurtenances* for a year after the testator's death. The ejectment was brought to recover 64 acres and a half of land, consisting of a park, meadow land, pasture land, and orchards, which were proved to have been constantly occupied by the testator for many years before his death in conjunction with the mansion-house. But the court did not see

<sup>a</sup> 1 Bos. et Pull. 53.

sufficient evidence of intention in the case to justify them in giving to the word *appurtenances* an effect beyond its technical sense, notwithstanding the fact of the usual enjoyment of the lands in question together with the house. The word *appurtenances* was therefore confined to the gardens, pleasure-grounds, walks, and *orchards*, though as to the orchards Eyre, C. J. appeared to have some doubts.

It has long been settled that by a devise of the *occupation*, or of the *rents and profits* of the land, the land itself is carried to the devisee. Thus where the occupation was devised to the executor for a time, and afterwards the land itself to another, the executor's execution of the legacy to himself was adjudged to be an execution of it to the other, *both their interests being the same*°. Such a gift of the *rents and profits*, or of the occupation of the land, is considered as a mere circumlocution (7) to express the thing itself (8). But the books make a difference between

By a devise of the occupation, or of the *rents and profits*, the land itself passes.

° *Welcden v. Elkington*, Plowd. 524. *Paramour v. Yardley*, Plowd. 539. And see *Parker v. Plumber*, Cro. El. 190.

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(7) The strictness of pleading requires that gifts or grants by circumlocutory phrases, be stated and described according to their true legal effect. So that if in a plea to an action of trespass the defendant state that the plaintiff licensed him to enter and occupy the land for the space of a month, such a plea would not be good, but he ought to say that the plaintiff *leased* the land to him for that time; for the facts will not prove a *licence* but a *lease*, notwithstanding the expression in the grant. See Plowd. 154. 542.

(8) It was observed by the court in *Paramour v. Yardley*, that this was more than the king shall have of the tenant in fee simple upon his outlawry in a personal action, for he shall have only the profits as they arise of themselves without manuring.

the devise of the use or occupation of a personal chattel, and the devise of the occupation and profits of land, or a chattel real. Thus in the year-book 37 H. 6. (9) the case was that A. being possessed of a book called the Grail, devised it to B. one of his executors, to have the occupation of it during his life, and that after his death C. should have it in the same manner for his life, and that after his death it should be disposed of by his executors to the use of a church, and died, and B. took the book, and kept it by force of the devise, and delivered it to the wardens of the said church, and died; then C. took the book, and the church wardens brought an action of trespass against him, and it was the clear opinion of the court, that the action was maintainable, because the book was never delivered to C. by the executors, and the occupation or possession of B. was no execution of the legacy to C. because nothing was devised to B. but the occupation, and the like to C., for the devise proves in itself that the *property* of the book was always in the executors, to the use of the testator, to the intent that they should dispose of it to the use of the church; the occupation was a distinct thing from the property: the occupation of one was not the occupation of the other, but their occupations differed from each other, and were several things devised out of the principal, for which reason the occupation of B. was no execution of the occupation of C.

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(9) Cited in *Paramour v. Yardley*, Plowd. 542. and approved by all the court; and see *Cary v. Appleton*, Ch. Ca. 240. where the same distinction is taken; and see *Moor*, 754. 3 Bulst. 105. and *Allen* 55. in which last case it was admitted that an *authority* to take the profits, implies as much as a devise of the profits.

As a devise of the rents and profits passes the land itself, so by a devise of the *ground rent* reserved on a lease for years, the reversion has been held to be carried to the devisee. This was determined in the case of *Maundy v. Maundy*<sup>p</sup>, which case was as follows. On a special verdict in ejectment for houses in ——— square, it was found that Ventris Maundy being seised of the reversion in fee of the houses, which were of the value of 260*l.* per annum, but then let on a lease for 60 years, at 22*l.* per annum, called a ground rent; and having several sons and daughters, made his will in April 1696, in the following terms: “In respect to my worldly estate, wherewith it has pleased God to bless me, I dispose of it as follows: To my son Daniel I give 4*l.* per annum of my ground rent;” and in like manner he parcelled out the whole 22*l.* to his children (except the eldest), his, her, and their assigns for ever; “but as to Ventris my eldest and undutiful son, I give him, in hopes he may reform, 5*l.* per annum, due on blank tickets in the million lottery. And if any of my other children die, their legacy to go to the survivor, my said undutiful son excepted, who is to have no share or part thereof, nor any more share or portion than I have before given him.”

By a devise of the *ground-rent* the reversion will pass.

The building leases being expired, the heir of Ventris the eldest son, brought this ejectment, insisting that the reversion was undisposed of; and that, however strong the intention to disinherit the eldest son appeared, yet, if it was undisposed of, he must have it<sup>q</sup>. And upon argument in the Common Pleas,

<sup>p</sup> Strange, 1020. Fitzg. 70. 288. S. C. in C. B. cas. temp. Lord Hardwicke, 142. 2 Barnard, K. B. 202.

<sup>q</sup> Denn v. Gaskin, Cowp. 661.



judgment was given against him in favour of the devisee, which judgment was affirmed in the King's Bench. And the case of *Kerry v. Derrick*\*, was relied on as good authority, and precisely to the point. So in a subsequent case† in Chancery, it was held that a bequest of *leasehold ground rents* passed not the reserved rent only, but the whole reversionary leasehold interest.

Of the effect of the word *premises*.

With respect to the force and extent of the word *premises* in a will, it is obvious that being entirely a word of reference, it will be commensurate in its operation to the extent of the words to which it refers, and as it may be extended by reference to any number of terms, its descriptive force may thus be made to cover a variety of subjects having no connection or affinity among themselves. Thus in a case‡ where a testator devised as follows: "I give and devise all that my messuage, dwelling-house or tenement, with the shop, barn, stable, and other buildings thereunto belonging, which said messuage or tenement, buildings, lands, or premises, are now in my own possession, and all other my real estate whatsoever, in M. or in any other place whatsoever, to S. and her assigns, for and during the term of her natural life; and from and after her decease, I give and devise the said messuage or tenement, buildings, lands, and premises, unto my youngest son W. B. his heirs and assigns for ever;" it was held that the word *premises* used in the devise to B., carried all that was before given to A., and was not confined to the premises in the testator's own pos-

\* *Moor*, 771. *Cro. Jac.* 104. cited in 2 *Vern.* 400. as *Cherry v. Dethick*.

† *Kaye v. Laxon*, 1 *Bro. C. C.* 76.

‡ *Doe d. Biddulph v. Meakin*, 1 *East*, 466.

session, so that a reversion in fee of another messuage, to which the testator was entitled after the determination of a life in being, in whose possession it was outstanding during his life-time, passed to the devisee in remainder.

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### SECTION III.

#### *Estate, Hereditaments, Inheritance, Property, Effects, &c.*

THE word 'estate' is a word of great compass; predicable of every species of property, corporeal or incorporeal, real and personal. It may also embrace every description of interest; and so far is it from being necessary in a will to add words of inheritance in order to make it pass a fee, that words of restraint must be added, or specific grounds for inferring a narrower intention in the testator must be shewn, to make it import less than the fee (1), where the fee is disposable.

In the great case of the Countess of Bridgewater *v.* the Duke of Bolton<sup>a</sup>, Lord Holt has commented

<sup>a</sup> 6 Mod. 106. Lord Hardwicke has said that this is a book of no authority, but that this case is well reported in it.

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(1) See *Barnes v. Patch*, 8 Vez. Jun. 604. The position of Lord Trevor in *Shaw v. Bull*, 12 Mod. 592. where he says that 'my estate,' 'the residue of my estate,' or 'the overplus of my estate,' may pass the estate; *where the intent is apparent to pass it*, is therefore to be considered as too narrow.

very learnedly upon the force of the word, taken separately, or in combination with others. The questions were whether the words "All my real and personal estate" passed the fee-farm rents; and if they did, whether they passed the fee-simple, or only a life interest, there being no words of inheritance in the will (2). And first, it was held that the rents passed: for the word 'estate' is genus generalissimum, and includes all things, real and personal: and, secondly, that the word 'estate' ex vi termini, passed the fee in a will (3).

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(2) The devise was to B., his executors and assigns; but this form of limitation does not seem, according to the latest and best authorities, to weigh much against the effect of the word *estate*, except perhaps where, as in *Chester v. Painter*, 2 P. Wms. 335. and *Rogers v. Buggs*, Andr. 210., the testator has shown his own clear apprehension of the difference between these different forms of limitation, by his addition of the word *heirs* to the word *estate* in other parts of his will. But even this argument has been considered as of little force in other cases; especially if from the general context of the will an intention to give the whole may be collected. See *Ibbetson v. Beckworth*, Ca. Temp. Talb. 157.

(3) Lord Holt observed that "most certainly in grants the word *estate* would not pass a fee, because the law had appointed that, let the intent be ever so fully expressed and manifested in grants, without the word 'heirs' the fee should not pass. Litt. Ten. Sect. 1.; and that, even if a scoffment were made to *J. S. to have to him a fee simple*, which words could have no other sense than to pass an inheritance, yet that an estate for life only would pass. 4 Com. dig. 'estates' (A. 2.); but that in a will it was otherwise; because a will of lands was a new conveyance, created by the statute, whereby a man was enabled to devise all his socage land *at his will and pleasure*; so that when a person manifestly shewed his intent that the devisee should have the inheritance, the statute that empowered him to devise his estate at his pleasure, would make his disposition good without tying him up to the forms of the common law." This reason will, however, occur to many readers, to be

It is observable; however, that Lord Holt laid considerable stress on the accompanying words ‘all’ and ‘my’. The word ‘all’ in his opinion, made the devise more comprehensive, and the word ‘my’, being a word of relation, expressed the amount of the identical interest which he had in the subject, viz. a fee. But subsequent cases have given to the word ‘estate,’ simply taken, a more absolute and independent force. And where it has been coupled with words of local description, or used in the plural number, it has been held to transmit all the testator’s interest in the subject. Where a testator devised all his estate *in D.*, it was decreed that the fee passed<sup>b</sup>. And the same point was afterwards ruled by Lord Hardwicke<sup>c</sup>; who in a subsequent case, considered the distinction between *in* or *at* a place, as an idle distinction<sup>d</sup>. In the case of Holdfast on dem. of Cowper *v.* Marten<sup>e</sup>, where the testator gave and bequeathed to A. his

*Estate, or estates, though particularized by name and place, will carry the fee-simple;*

<sup>b</sup> Barry *v.* Edgeworth, 2 P. Wms. 522.

<sup>c</sup> Tuffnell *v.* Page, 2 Atk. 37.

<sup>d</sup> Goodwyn *v.* Goodwyn, 1 Vez. 228.

<sup>e</sup> 1 T. R. 411.

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imperfect and unsatisfactory; for where lands were devisable before the statute, by the customs of particular places, the same latitude and indulgence was allowed to testators; who are to be supposed, in the majority of cases, to make these final dispositions of their property, in a condition of mind in which it would be unreasonable to expect correct phraseology. Thus where lands were devisable under the custom of a place, express and precise words of limitation were not necessary by the common law; for a devise of lands to a man, et sanguini sui, passed an estate tail. 1 Roll. Abr. 834. pl. 17.; and so a devise of lands to a man, in fee-simple, or to him and his assigns for ever, has always passed a fee-simple. See Doe d. Lady Dacre *v.* Roper, 11 East, 518.

estate at B. A. was adjudged to take the estate at B. in fee.

Lord Hardwicke, in the above-cited case of *Goodwyn v. Goodwyn*, remarked that though later cases had gone farther than that of the Countess of Bridgewater *v.* the Duke of Bolton, and had held that by a devise of "all my estate *in* or *at* such a place, not only the lands themselves, but all the interest passed," yet that there was no case where it had been so held, where there was a farther description, as in the case then before him, viz. in the *occupation of particular tenants*. The word, too, being *estates*, and not estate, made such a difference in the case as to induce him to suspend his judgment.

Both these difficulties appear now to be removed. In the case of *Fletcher v. Smiton*<sup>f</sup>, it was clearly decided that the word *estates* in a will carries the fee, unless coupled with other words that shew a different intention. And in a recent case<sup>g</sup> a devise of "all my estate, lands, &c. known and called by the name of the coal-yard, in the parish of St. Giles's, London," was held to carry the fee-simple in the premises devised. The law must, therefore, be considered as settled, that no words describing the situation of, or otherwise particularizing, the land devised, shall restrain the word *estate* from carrying the fee-simple. In the last-cited case the court adopted Lord Hardwicke's remark in *Goodwyn v. Goodwyn*, "That there was no reason why the words *in the occupation of* B. and D. should restrain the extent of the word *estate* more than the locality, which

<sup>f</sup> 2 T. R. 656.

<sup>g</sup> *Roe d. Child v. Wright*, 7 East, 259.

would not." It is not surprising, therefore, that after these decisions the court of Common Pleas should have interposed in a very late case to save the counsel the trouble of arguing that a devise of 'all my estate of *Ashton*' passed the fee-simple<sup>a</sup>.

As to the word *hereditament*, the better opinion seems always to have been, that it does not per se denote the quantum of interest conveyed. Thus in the case of *Hopewell v. Ackland*<sup>1</sup>, upon its being contended that the word *hereditament* imported an inheritance, Lord Trevor stated decisively that this word *hereditament* can not be taken to denote the measure or quantity of estate, but that it has a larger meaning than *lands* and *tenements*, as it may extend to annuities, advowsons in gross, &c. And in the subsequent case of *Canning v. Canning*<sup>2</sup>, it was said by the Master of the Rolls, that the law was settled in the case of *Hopewell v. Ackland*, that a fee will not pass by the word *hereditaments*. Again Lord Kenyon in the case of *Doe d. Palmer and others v. Richards*<sup>3</sup>, admitted that the words "All the rest, residue, and remainder of my messuages, lands, tenements, and *hereditaments*," were not sufficient in law to carry a fee: and the same was held for law in the subsequent case of *Denn d. Moor v. Miller*<sup>4</sup>. The law on this point may therefore be regarded as settled contrary to the single opinion of Powell J. in *Lydcott v. Wil-*

The fee will not pass by force of the word *hereditaments* alone.

<sup>a</sup> Sir Arthur Chichester v. George Chichester Oxendon, 4 Taunt. 176. The Chief Justice observed, that he did not think it would have helped the plaintiff much if the testator had said 'All my Ashton estate.' And in *Bailis v. Gale*, 2 Vez. 48. a devise of "all the estate I bought of M." passed the fee.

<sup>1</sup> 1 Salk. 238. <sup>2</sup> Mosel. 241. <sup>3</sup> 5 T.R. 358. <sup>4</sup> 5 T.R. 558.

lows", who said that *hereditament* was equivalent to the word *inheritance* ; and that it could not be doubted that if a testator, seised of lands in fee-simple, devise the same by the words ' my inheritance,' the fee would pass.

The fee  
passes by  
the word  
*inheritance*.

That by the word *inheritance* the fee passes in a will, is sufficiently settled upon the authority of Lord Hobart<sup>a</sup> and Lord Holt<sup>b</sup>. And in the case of *Trent v. Hanning*<sup>c</sup>, where the testator had appointed certain persons ' trustees of inheritance,' for the execution of his will ; though Lawrence J. thought these words too vague and indefinite to pass the fee, the other three Judges considered that the testator plainly meant to make trustees of his estates of inheritance in the same manner as if he had used the words ' trustees of my inheritance,' or ' trustees to inherit my estates,' and they therefore certified their opinion that the trustees took the fee-simple.

Of the im-  
port of the  
word *prop-  
erty*.

Lord Mansfield has said<sup>d</sup>, that the word *effects* is equivalent to *property* or *worldly substance* ; but two recent cases determined in the court of King's Bench, have established a distinction between them of great importance. According to the late case of *Doe, lessee of Wall v. Langlands*<sup>e</sup>, the word *property*, unaffected by the context of the instrument, seems to have been considered as comprehending all that the testator is worth, and as passing as well his real as personal estate ; in which case there were no

<sup>a</sup> 3 Mod. 229.

<sup>b</sup> *Widlake v. Harding*, Hob. 2.

<sup>c</sup> Lord Raym. 834.

<sup>d</sup> 7 East, 97.    <sup>e</sup> *Hogan v. Jackson*, Cowp. 299.

<sup>f</sup> 14 East, 370.

introductory words expressing an intention of disposing of every thing the testator had, and the word *property* was immediately followed by words expressive only of personal estate, viz. ‘goods and chattels.’ As to the question, which the Chief Justice said, was the material one in the case—whether the words immediately following the word ‘property,’ were descriptive of the *kind* of property the testator intended to give, his Lordship disapproved of construing them, as explanatory of what was meant by *property*, and maintained that it was more obvious and natural to read the words cumulatively, i. e. as ‘my property *and* goods and chattels,’ than as ‘my property, *namely* my goods and chattels.’

It is very difficult to find any solid principle of distinction between the case of *Doe v. Langlands*, above cited, and that of *Roe d. Helling v. Yeud*<sup>t</sup>, which a year or two before was decided in the Court of Common Pleas. There the testator, after directing his debts and funeral expences to be paid by his executors, and making several bequests of annuities and money, devised to his five grandchildren, whom he appointed executors, as follows: “To whom I give all the remainder of my *property* whatsoever, and wheresoever, to be divided equally, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stock, bills, bonds, book-debts, and securities in the Witham drainage in Lincolnshire, and funded property.” There being no pro-



vision throughout the will that appeared to have any relation to real estate, and nothing being given to any person his heirs and assigns, and the intention of the testator seeming to the Court to be at most doubtful, it was determined upon the general rule that an heir ought not to be excluded unless the intention to give the real estate away from him appears plainly by the will itself, that the title of the heir should prevail.

The reason of the doubts felt by the Court as to the testator's intention, or rather of the inclination of their minds to think that the testator meant only to dispose by will of his personalty, was the particularity of the enumeration of personal things at the end of the clause: but that lawyer must be acute indeed, who can find a principle for deciding how many particulars enumerated after the word 'property,' expressive of personal estate only, shall restrict the sense of that sweeping term to a disposition of personal things alone.

Of the import of the word *effects*.

The case of *Hogan d. Wallis and others v. Jackson*<sup>a</sup>, which had been nine years depending in the Courts in Ireland, turned upon the single question whether the residuary clause expressed in these words, "I also give and bequeath unto my dearly beloved mother, Mary Jackson, all the remainder and residue of all the *effects*, both *real* and personal, which I shall die possessed of" were sufficient to pass the real estate. It was contended at the bar that the word *real* might be satisfied by confining its sense to

<sup>a</sup> Cowp. 290.

*real chattels* (4); and though Lord Mansfield and the Court decided that the phrase *real effects* clearly carried the real estate, yet their decision seemed rather to found itself upon the capacity and extent of the word itself in legal phraseology (5) than upon the principle which is now taken as the hinge of all these cases, i. e. the intention of the testator, without any technical regard to the words used by him.

In *Doe d. Chilcott v. White* <sup>\*</sup>, Lord Kenyon can hardly be said to have carried the doctrine farther by holding, that where the testator having before devised real and personal property to his wife for her life, empowered her to give what she thought proper of her *said effects* to her sisters for their lives, the disposing power extended to the *realty*.

<sup>\*</sup> 1 East, 33.

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(4) The force of the word *real*, when added to a general term, such as property or effects, can at this time hardly be doubted. But where the devise was of all his goods and *chattels*, real and personal, moveable and immoveable, Lord Hardwicke, upon very plain grounds of distinction, was of opinion, that the lands would not pass by the law of England, though they might have so done by the civil law. *Grayson v. Atkinson*, 2 Wils. 333. See *Markam v. Twysden*, 1 Eq. C. Abr. 211. and see *Ridout v. Pain*, 492. Chattels real are not called so because they are real estate, but because they are extractions out of the real estate, per Holt, C. J.

(5) As the Courts had already got so far as to hold that the word *legacy* might signify a devise of land, when used in a will in that sense, (by Lord Macclesfield in *Beckley v. Newland*, 2 P. Wms. 182. and by Lord Mansfield, in *Brady v. Cubit*, Dougl. 40.) one might have expected that in the case above cited, Lord Mansfield would have rested the question as to the extent of the word *effects*, upon the broad ground of intention.

In the case of Doe on the demises of Andrew and others against Lainchbury and others', both the words *property* and *effects* occurred in the residuary devise, blended with an enumeration of personal things, but they were both considered as embracing the real property, the testator having used them in other parts of his will to describe real estate. By the residuary clause he devised all his "*money, stock, property, and effects*, of what kind or nature soever to A. and B. ; to be divided equally between them, share and share alike," but he began his will by stating "as to my money and effects I dispose thereof as follows," and then proceeded to dispose of parts of his *real* estate. And again having *lands* lying together with the *lands* of another person, he directed the latter to be purchased, if offered for sale, to be added to his other adjoining *property* : thus shewing by his own use of the words that he considered them as being applicable as well to real as to personal estate.

One clear doctrine results from all these cases :— that although the word 'estate,' taken independently of the context, by its own force, denotes not only real as well as personal estate, but the highest degree of real estate, and the word *property* carries of itself both real and personal property, while the word *effects* is generally and properly applicable to personal estate only ; yet that all these words, and, indeed every form of expression whereby a testator declares his will in respect to the disposition of his property, submit to the rule which requires a will to be construed agreeably to the intention of the testator, where it can be collected from the whole

will, and is consistent with law and public policy.

No criterion is more frequently resorted to in the books for expanding or contracting the sense of the words, *estate*, *property*, and *effects*, than the company in which they appear. Thus, the word *estate* is frequently restrained to things ejusdem generis with those with which it is coupled and associated. As where a man, seised in fee of lands absolutely, and of other lands by mortgage not forfeited, devised first all his lands in fee to A., and all the rest of his goods, chattels, estates, mortgages, debts, &c., to C., it was holden that no freehold passed<sup>\*</sup>; and of this decision Lord Holt strongly approved in the great case of the Countess of Bridgewater v. the Duke of Bolton, above-cited.

Of the doctrine of construing words as ejusdem generis with the accompanying words.

A long list of determinations to the same effect has been confirmed by a late case<sup>a</sup> decided by the present Lord Chancellor. There the testator, after directing that his debts should be paid out of his personal estate, gave certain legacies; and, having a real estate in land, and a real estate in a rent-charge, devised the latter to his wife for life, and after her death to trustees to sell; and, after giving some more legacies, directed that as and for the monies to be received from the sale and disposal of the said rent thereinbefore devised in trust to be sold on the death of his wife, as also the monies to arise from a sale of the remainder of his household goods and furniture, plate, linen, china, beds and bedding, and from all other his *estate* and effects, of what

<sup>\*</sup> Wilkinson v. Maryland, Cro. Car. 447. 1 Rol. Abr. 834.

<sup>a</sup> Woollam v. Kenworthy, 9 Vez. Jun. 137.

nature or kind soever, or wheresoever, the same should in the first place be subject and liable to, and charged and chargeable with, the payment of the before-mentioned legacies; and the residue of such monies to arise as aforesaid, he directed to be divided and applied as therein mentioned.

Upon this will, Lord Eldon observed, that, though the words charging the personal estate with the legacies could mean nothing, the personal estate being by law chargeable with the legacies, yet that they were capable of being fairly enough interpreted as applicable to the money arising from the sale of the real estate. The question was, whether upon the whole it was not clear that the testator did not mean that any thing of a real nature should pass under the word *estate*? For that purpose every part of the will must be looked at, to determine, whether that word, in the context in which it occurs, and upon the general intention of the will, and all the phrases of it taken together, was to be understood ejusdem generis with the personal estate immediately before described, or as meant to take in the real estate. It was to be considered whether by the insertion of this word, where it occurred, the testator, who had anxiously provided for the application of a real estate, expressly devised upon the trust, could be taken to mean that this other real estate of which he was so seised, should by the effect of the word 'estate' standing as it did, be cloathed, in the hands of the heir, with a trust of the very same nature as the estate specifically devised to the trustees. That was not the probable intention upon the will, taken altogether; and upon the whole he thought, and so decreed, that the estate in question descended upon the heir at law, for his own benefit.

Where the testator explains his own meaning by the word *estate*, by shewing of what he understands it to consist, there can be no room for doubt. This was the plain reason of the decision in *Timewell v. Perkins*<sup>b</sup>, by Mr. Justice Fortescue, at the Rolls. The clause was thus, "Item, all those my freehold lands and hop-grounds, with the messuages, &c. now in the tenure of L., and all other the rest, residue, and remainder of my estate, *consisting* in ready money, plate, jewellery, leases, judgments, mortgages, &c. or in any other thing whatsoever and wheresoever, I give to A. H. and her assigns for ever."

But where the word *real* is added to the word 'estate,' whatever words of limited expression or partial extent may precede, or surround, or follow, it would be difficult, indeed, to maintain, that any thing less than both land and inheritance are embraced by it. Thus in *Ridout v. Pain*<sup>c</sup>, where a testator gave all the rest, residue and remainder of his goods and chattels, and personal estate, *together with his real estate*, Lord Hardwicke said there could be no question but that the words, "together with my real estate," would carry the land and inheritance, though accompanied with the other words, "goods and chattels, &c."

Whether the word 'estate,' 'property,' and others of that general class, precede or follow the enumeration of particulars, is a circumstance which seems to afford no solid criterion for deciding whether they are,

<sup>b</sup> 2 Atk. 102.

<sup>c</sup> 3 Atk. 486.

or are not, to be construed ejusdem generis with the particulars specified. Nor can ordinary faculties of discernment see any better ground of distinction in the *number* of the articles enumerated; or understand, why the articles which succeeded the word *property* in the above-cited case of *Roe v. Yeud*<sup>d</sup>, in the Common Pleas, were held to restrict that word to personal things, while in the case of *Doe v. Langlands*<sup>e</sup>, the word *property* was construed to extend to real estate, notwithstanding it was followed by words of like limited import. Probably, however, the last-mentioned case, which has treated the succeeding words as accumulative rather than explanatory, will be adhered to in future as the safer and more masculine decision.

Where the word *estate* comes after several words properly descriptive of personalty only, Lord Hardwicke has furnished a test more intelligible and applicable than many others which have been relied on. He says that where the preceding words fully comprehend all the personalty, so that there is nothing to satisfy the word 'estate,' unless it be held to apply to the real property, there, notwithstanding the company in which it is found, it will pass the real property of the testator. The case in which this distinction is found is that of *Tilly v. Simpson*<sup>f</sup>, in Chancery, Easter, 1746. The testator, after declaring that he intended to dispose of all his worldly estate, and making several devises to different persons, gave and bequeathed "all the rest and residue

<sup>d</sup> 2 N. R. 214.

<sup>e</sup> 14 East. 370.

<sup>f</sup> 2 T. R. 659 Note to *Fletcher v. Smiton*.

of his money, goods, chattels, and estate whatsoever," to his nephew A. B., and the question was, whether a beneficial interest in a real estate not before disposed of, would pass to the nephew by this devise.

Lord Hardwicke was of opinion that it would. He said, that where the court had restrained the word *estate* to carry personal estate only, it had appeared that it was the intention of the testator that it should be so understood : as where it had stood coupled with particular descriptions of part of the personal estate, as a bequest of "all my mortgages, household goods, and estate," in which the preceding words were not a full description of the personal estate. But that it was otherwise where the preceding words were sufficient to pass the whole personal estate. If the testator had said, "All the rest and residue of my personal estate and estates whatsoever," a real estate would have passed. His Lordship then observed that the bequest in the case before him amounted to the same, for the word *chattels* was a full description of the personal estate ; therefore, since the testator had used words comprehending all his personal estate, and then had used the word *estate*, that word would carry a real estate. That the word *whatsoever* was used, which was the same as if he had said, *of whatsoever kind it may be* (6) ; and if that had been the case it would most certainly have carried the real estate. The case

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(6) In the late case of *Hicks v. Dring*, 2 M. and S. Trin. Term, 1814, the words after *effects* were *of what nature or kind soever* ;



of *Tirrell v. Page* \* was, his Lordship said, very material to the question, and he thought the cases could not be distinguished. There the gift was of "all the rest and residue of my money, goods, and chattels, and all other estates whatsoever, I give to J. L." The only difference was in the word *other*, which he did not think could distinguish it. If it had been 'all the rest and residue of my household goods and mortgages, and all other estate,' he did not think that those words would have carried the real estate.

If the reasoning of Lord Hardwicke be thought a little refined, and seems, as far as it proceeds upon the ground of executing the intention, to found the inference of intention upon a distinction of words rather too technical to decide the meaning of unlearned testators, it nevertheless affords a principle of some certainty, and which, if adhered to, may at least conduce to judicial consistency.

The word *effects*, we have already seen, by its general import, carries per se nothing beyond the personalty, although like all other words of description in a will, its sense may be enlarged so as to embrace real estate by force of the context. But though the words *wheresoever and whatsoever*, or, *of what nature or*

\* 1 Chan. Ca. 262.

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but these words were not considered as enlarging the sense of the term. So in the case, already cited, of *Woolham v. Kenworthy*, 9 Vez. Jun. 137. the word *estate* was preceded by the word *other*, and followed by the words *of what nature or kind soever*, and yet it was confined to things ejusdem generis.

*kind soever*, follow the word *effects*, they are not sufficient without other aid from the context to bring real estate within the descriptive force of the term. Thus, where a testatrix, seised in fee of real estate, devised "all the rest residue and remainder of her effects wheresoever and whatsoever, and of what nature, kind, or quality soever," (except her wearing apparel and plate), to certain nephews and nieces, to be equally divided between them by her executors, it was held that the residuary clause did not carry the real estate <sup>1</sup>.

There were several circumstances indeed in the will last-mentioned, to oppose the extension of the word *effects* to real estate, as, the exception of wearing apparel, and the placing the subjects of the devise under the management of the executors. But in a case just determined in the Court of King's Bench, and not yet reported, the rule seems to be established that a simple disposition by a testator of *all and singular his effects of what nature and kind soever*, will only pass the personal estate <sup>1</sup>.

The words "of what nature or kind soever" do not enlarge the sense of the word effects.

Nor will this word, although followed by the words *of what nature or kind soever*, always embrace the whole *personal* property of the testator; it is often confined to such particulars only as are *ejusdem generis* with certain matters and things before enumerated. Thus, where a testator bequeathed to his wife an annuity of 200*l.* per annum, being part of the monies he then had in bank security, entirely for her own use and disposal, *together*

\* *Camfield v. Gilbert*, 3 East, 516.

<sup>1</sup> *Hicks v. Dring*, 2 M. and S. T. R. Trin. Term, 1814.

*with all his household furniture and effects, of what nature or kind soever*, the word was confined to articles ejusdem generis, that is, to household furniture <sup>k</sup>.

It is very material, however, to observe that in the case last-mentioned, part of the testator's personal property was devised to the wife in the foregoing part of the will;—a circumstance tending strongly to shew that the testator meant the word *effects* to receive a limited interpretation. And this circumstance was sufficient to weigh against the consideration of the intestacy as to some of the property of the deceased which was the consequence of the construction adopted.

In the case of *Camfield v. Gilbert*, a little above cited, it appeared that the exception of wearing apparel and plate, served in some measure to mark and circumscribe the meaning which the testator meant to give to the word *effects*; for by the exception, the class out of which the exception was made was implicitly characterized. And upon the same principle of construction the sense of the word *effects* was in another case *enlarged* by force of the exception. Thus where the words in a codicil were “plate, linen, household goods, and *other effects*,” (money excepted), Lord Eldon observed, that though the doctrine appeared to be settled in the Court of Chancery, that the words *other effects* in general meant effects ejusdem generis, yet as money could not be represented as ejusdem generis with plate, linen, and household goods, the express exception of money out of the *other effects*, shewed the testatrix's

<sup>k</sup> *Rawlings v. Jennings*, 13 Vez. Jun. 39.

understanding that it would have passed by those words, and that express words were required to exclude it. She thought, that the words of the bequest would carry things not ejusdem generis. The disposition must, therefore, be taken to comprehend all that she has not excluded, which was *money* only. His Lordship accordingly decided that stock in the funds which does not pass under the word *money*, was included in, and passed under, the words of the bequest<sup>1</sup>.

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#### SECTION IV.

##### *When the whole Estate passes.*

BY the law of England, in the conveyance of real estates, words of limitation are required to the donation or grant, for the creation of an estate of inheritance. Thus Lord Holt in the Countess of Bridgewater's case<sup>a</sup>, in speaking of the construction of the word *estate*, said, that "most certainly in grants it would not pass a fee, because the law appoints that, let the intent of the parties be ever so fully expressed and manifested in grants, without the word *heirs* a fee shall not pass. (1) If a feoffment," continued that

The word 'heirs' necessary to carry the inheritance in a grant.

<sup>1</sup> Hotham v. Sutton, 15 Vez. Jun. 319.

<sup>a</sup> 6 Mod. 106.

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(1) The Reader will find in Co. Litt. 9. b. many instances in which a fee will pass by deed or grant without the word *heirs*, but they are all exceptions which prove the rule. Thus, if a father enfeoff the son to have and to hold to him and his heirs, and the son enfeoff the father as fully as the father enfeoffed him, by this the father hath a fee-simple. So by the ancient law gifts in frank marriage, or for the consideration of marriage, carried the inheritance

In what instances a fee may pass in a grant without the word *heirs*.

great judge, "be made to I. S. *to have to him in fee-simple*, which words can have no other sense than to pass an inheritance, an estate only for life shall pass, and yet '*fee-simple*' in pleading, is that which describes the inheritance, as *seisitus in dominico suo ut de feodo*. It stands also upon the authority of Littleton<sup>b</sup> that "if a man would purchase lands or tenements in fee-simple it behoveth him to have these words in his purchase, 'to have and to hold to him and his heirs;' for these words 'his heirs' make the estate of inheritance. For if a man purchase by these 'to have and to hold to him for ever;' or by these words 'to have and to hold to him and his assigns for ever;' in these two cases he has but an estate for term of life, for that they lack these words, 'his heirs' which words only make an estate of inheritance in grants."

<sup>b</sup> Sect. 1.

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without the word *heirs*. Corporations aggregate, which in judgment of law never die, take the fee without the word *successors* in the grant to them. And for the same reason, because the king never dies in judgment of law, a grant to him by deed enrolled passes the fee to him without the words *heirs* or *successors*. If one coparcener, or joint-tenant releases to the other, or, if there be three, and one releases to one of the others, generally, and without the word *heirs*, the fee passes. A fine sur cognisance de droit come ceo, &c. by which it is implied, that there was a precedent gift in fee, will carry the fee without words of limitation. And so, by a common recovery the recoveror recovers the fee-simple without the word *heirs*. By those releases also which work by extinguishment the whole estate may pass without words of inheritance, as where the Lord releases to the tenant of the land all his right, &c. the seignory, rent, &c. are extinguished for ever, without the word *heirs*. And it is said that if land be conveyed by bargain and sale enrolled for a consideration in money, which reaches to the whole estate, the fee-simple passes, for the conveyance works by contract and by the use created. See Viner. Abr. title estate, (K 2) and (L).

Upon the same authority it stands<sup>c</sup> that before the statutes 32 and 34 H. 8. where, by the custom of ancient boroughs and cities, lands and tenements were devisable by testament, the great rule prevailed, that the will should be performed according to the intent of the devisor; and therefore, if, before the statute taking away the necessity of attornment, (2) a man seised of a rent-service or rent-charge, devised such rent or service to another, the devisee was competent to distrain the tenant for the rent or service in arrear, without any previous attornment from such tenant: for if the effect of the gift were to depend upon the attornment of the tenant, perhaps the tenant might never attorn, and then the will of the devisor would never be performed. "So," says the same venerable writer, "if a man deviseth such tenements to another by his testament habendum sibi imperpetuum, and the devisee enter, he hath a fee-simple *causa qua supra*." It was the maxim of the *common law*, and not, as has been sometimes said<sup>d</sup>, a principle arising out of the wording of the statute of wills, that *ultima voluntas testatoris est perimplenda secundum veram intentionem suam*.

But it is equally a fundamental rule in respect to the operation of wills of land that the intention must be disclosed either by expression or clear implication, to carry the inheritance; and this arises from the peculiar character of a will according to the law of Eng-

<sup>c</sup> Lib. 3. c. 10. Sect. 585, 586. of Attornment.      <sup>d</sup> See ante.

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(2) The necessity of attornment was taken away by statute 4 and 5 Ann. c. 16. and the efficacy by statute 11 Geo. 2. c. 19.

land, which considers it as an appointment to uses in the nature of a conveyance, and capable, as such, of operating only upon the real property which the testator has at the time. In analogy, therefore, to the case of a conveyance, the deviser must mark his intention by expression, or some positive ground of inference, in the instrument itself, that is, either by a form of limitation, or by words amounting to a virtual declaration of his will.

What shall amount to such virtual declaration of a testator's will is not established on any system of rules; for no rule can anticipate the infinite variety of supposable cases. The rule which may, under circumstances, supersede every other is this, that the construction of every will is to be made with reference to the whole, and to be grounded upon a consideration of the reciprocal bearings of all the component parts. A doctrine, which necessarily, to a certain degree, renders every case upon wills an individual case, and not to be used as a precedent but with great caution.

Where decisions, however, have turned upon the signification of certain words, or phrases, as expressing by circumlocution the settled operation of certain technical limitations, they may be said to have reduced even this luxuriant branch of the law to the consistency and certainty of rule and system. Such constructions, too, as rest upon those primary rules which are borrowed from the consideration of the great end and purpose of all testamentary acts, as, *that words are to be construed so as to effectuate dispositions and to avoid intestacy; and that every testator is to be regarded as intending a benefit rather*

*than a burthen by his gifts*, afford a standard of interpretation in a vast variety of cases.

In the commentary upon the first section of his author, Lord Coke has stated by way of example several cases to shew where estates of inheritance may pass in wills, without words of formal and regular limitation. As if a man devise lands to another in perpetuity, or to give, or to sell, or in fee-simple, or to him and his assigns for ever. (3) All which may be considered as examples of the circumlocutions above alluded to; and the case he puts of the devise of 20 acres to another, and that he shall pay to his executors for the same ten pounds, whereby the devisee takes the fee, upon the ground that the devise might otherwise be a detriment rather than a benefit, by his dying before any profit could be derived from it, is an example of the rule that every testator is to be considered as intending a benefit to the object of the gift.

A devise to a man and his successors\* will give the fee, and so will a devise to a man and to his blood, for the blood runs through the collateral line, as well as

What words in a will are equivalent to a limitation to the heirs.

\* Roll. Rep. 399.

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(3) The dictum in Perkins, sect. 557. that if lands be devised to J. S., to hold to him and his assigns, he will take by these words a fee is clearly not law, and is contrary to Lord Coke, who says in the passage to which we have been referring, that if a devise be to a man and his assigns, without saying *for ever*, the devisee hath but an estate for life, Co. Litt. 9. b. And if the devise be to several, equally to be divided between them and their assigns, it carries only an estate in common for life.



the lineal<sup>f</sup>, but a devise to one et semini suo, or<sup>g</sup>, it seems, to his posterity, would create an estate tail<sup>h</sup>. Nor is any particular form of expression necessary to the effect of the devise; for if a testator *releases*, by his will, to I. S. and his heirs, I. S. will take the fee<sup>i</sup>.

Whether the devise imports all that the testator has, or confers the entire dominion over the thing given, it is the same in effect.

And whether the phrase used by the testator imports the whole interest residing in himself, or the entire dominion and enjoyment of the thing by the devisee, the same effect is produced. Thus, it is the same thing whether a testator gives 'all his estate,' 'all he is worth<sup>k</sup>,' 'whatever he has in the world<sup>l</sup>,' 'all his inheritance<sup>m</sup>,' 'all his right, title and interest<sup>n</sup>,' 'all his part, share and interest<sup>o</sup>.' Or, devises his lands to I. S. "to give sell or do therewith at his will and pleasure<sup>p</sup>," or 'for his own use and to give away at his death to whom he pleases<sup>q</sup>,' or 'to dispose thereof at his free will and pleasure;' (4) in all of which

<sup>f</sup> Co. Litt. 9. b.      <sup>g</sup> Ibid.

<sup>h</sup> Atty. Gen. v. Bamfield 2 Freem. 268. Vin. tit. Dev. (L a.)

<sup>i</sup> And. 33. and see 1 Lord Raym. 187.

<sup>k</sup> Huxtep v. Brooman, 1 Bro. C. R. 437. But *all*, of itself, does not imply all the testator's interest, see Bowman v. Milbranck, 1 Eq. Ca. Abr. 208.

<sup>l</sup> Hopewell v. Ackland, Com. 164.

<sup>m</sup> Widlake v. Harding, Hob. 2.

<sup>n</sup> Cole v. Rawlinson, 3 Bro. P. C. 7.

<sup>o</sup> Andrew v. Southhouse, 5 T. R. 292.

<sup>p</sup> Bro. Tit. Dev. pl. 39. Co. Litt. 9. b.

<sup>q</sup> Timewell v. Perkins, 2 Atk. 102.

Difference between the phrase 'to be freely enjoyed' and 'to be freely disposed of.'

(4) Goodtitle v. Otway, 2 Wils. 6. and see Maskelyne v. Maskelyne, Ambl. 75. But there is a clear distinction between the expression in the text which implies a perfect dominion of the estate, and the phrase, 'to be freely possessed and enjoyed' which in the case of Goodright d. Drewry v. Barron, 11 East, 220. was

cases the fee-simple would undoubtedly pass to the devisee. (5)

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held to carry to the devisee nothing beyond an estate for life. The import of these words might be satisfied by being understood to mean 'freely during life,' or 'free from all charges,' or 'free from impeachment of waste.' The testator might mean more, but the court ought not to give to them a more extended meaning than was necessary against the heir. In the above case it was observed by Mr. J. Le Blanc that if the lands had been given to the devisee 'freely to be disposed of,' the intent would have been shewn to pass the fee. The case was distinguishable from *Loveacres v. Blight*, Cowp. 352. where similar words were held to pass the fee; for in that case, there being a charge on the devisees which might last longer than their lives, there was a ground for understanding the words of the devise in the largest sense they would bear, otherwise the benefit intended by the testator might be unavailable.

Though it may be looked upon as settled that the devise of an estate, generally, to be at the disposal of the devisee, gives the fee-simple, yet where the estate is expressly limited to the devisee *for life*, with a power of disposition, the devisee takes no more than a life-estate with a power annexed. If the party dies without having executed the power, the interest ceases with the life, and no one can take by transmission through the devisee, 3 Leon 71. 4 Leon 41. *Tomlinson v. Dighton*, 1 P. Wms. 149. *Reid v. Shergold*, 370. and see *Bradley v. Westcott*, 13 Vez. Jun. 445. And such a power must be exercised in conformity with the intention expressed in the terms of its creation. Thus in *Doe d. Thorley v. Thorley*, 10 East 438. where a man devised all his freehold estate to his wife *during her natural life*, and also *at her disposal afterwards to leave it to whom she pleased*, the court adjudged that the word *leave* confined the authority of the devisee for life to a disposition by her will only. In *Tomlinson v. Dighton* the power of disposal annexed to the life estate was unrestrained.

(5) Where the property is personal, the words 'all I am possessed of' and such like expressions, where they stand uncontrouled by the context will have the effect of passing all the personal estate which the testator has at his death, and not only what he possesses at the date of the will. 5 Vez. Jun. 816.

A direction to purchase land for another implies the purchase of the fee-simple.

In the construction of wills, words must receive a natural interpretation, and be understood in their received sense. Thus in the case of *Green v. Armstead*<sup>\*</sup>, where A. devised his house and land in C., to his son B. for his life, and then to remain to D. the son of B., except B. *purchased* another house with so much land, and of the same value, as the said house and land in C. for the said D. his son, and then B. might sell the house and lands in C. as his own, it was held that D. took a fee in the house, and lands in C., as B. did not make any purchase of any other lands; for the word *purchase* imported, in common speech, an absolute purchase in fee. And therefore, if a man directs his executors to *purchase* land for his son, no doubt says the case, it will import a fee-simple.

Appointment of a person to be heir is a gift of the fee-simple.

And though, as has been above remarked, a will, according to the law of England, is a species of conveyance, differing in that respect from the Roman will, which is rather the appointment of an heir; and though, in propriety of speech, no one can be truly the heir by our law, but he whom the law makes so; yet, says the same great author from whom the point last-mentioned was taken, "There is an heir by appellation and vulgar acceptance, which imitates the state of a true heir. And, therefore, if by my will I appoint that I. S. shall be the heir of my land, he shall have it in fee, for such estate as the ancestor hath, such estate he is to inherit." So in a subsequent case where the words of the will were, "I make my cousin, G. B., my sole heir and executor;" it was held not only that the lands passed without being mentioned, but a fee-simple in the lands<sup>†</sup>.

<sup>\*</sup> Hob. 65.

<sup>\*</sup> Spark v. Purnell, Hob. 75.; and see the record in Wynche's Entrees, 407.

<sup>†</sup> Style 307, 383.

We have seen above, that one of the cases put by Lord Coke, in commenting on the first section of Littleton, wherein an estate in fee might be passed by a will without the word *heirs*, was that of a devise to B. paying a sum of money to his executors. Accordingly it has long been settled, that where land is given by a will, with a direction that the devisee shall pay a gross sum out of it, the devisee thereby takes the fee-simple; and this, although the sum so directed to be paid be below the value of the land for one year; for, as has been before observed, one of the primary rules in the construction of wills, is this—that every devise shall be intended to carry with it a benefit; and if the devisee in the case supposed, took only an estate for life, he might die before he could be compensated out of the land, and so the devise, instead of a benefit, might bring a loss to him.

If land is devised generally, and the devisee of the land is charged, in respect thereof, with the payment of a sum of money, he takes fee.

Thus in Collier's case<sup>u</sup>, where a testator gave lands to his brother, paying to one person twenty shillings, and to others small sums, amounting to forty-five shillings all together, the land being of the value of 3*l.* per annum, it was adjudged that the brother took an estate in fee<sup>v</sup>. So, if I devise my land to I. S., in consideration that he will release 100*l.*, which I owe him, to my executors, the devisee, upon releasing the debt, has the fee-simple for the same reason<sup>x</sup>.

For the same reason, also, if I devise my lands charged with the payment of my debts and legacies, the fee will pass to the devisee. Thus, where A. seised of lands in fee, made his will; and gave his cousin B. 20*l.*, to be paid out of his lands within one year; and after other legacies, he gave all his lands to R. gene-

So if such devisee is charged with the payment of debts and legacies.

<sup>u</sup> 6 Rep. 16.

<sup>v</sup> 3 Rep. 21. a. 1 Roll. Abr. 834.

<sup>x</sup> Bendl. 15.

rally ; it was adjudged that R. took an estate in fee-simple<sup>7</sup>. And where a testator devised by the following words, " All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expences being thereout paid, I give, devise, and bequeath unto my sister J. D. ; and constitute and appoint her my executrix and residuary legatee of this my will," Lord Kenyon said, that the first words alone were not sufficient in law to carry the fee ; but that he relied on the words immediately following,—“ My legacies and funeral expences being thereout paid,” as sufficient for that purpose ; for the fund which was to answer these purposes ought to be as ample as possible. These charges extended to, and were to be taken out of, the property which was before given to the residuary legatee ; and if that devise did not comprise the whole of the devisor's estate, the interest as well as the land, the legacies and funeral expences might not be paid<sup>8</sup>.

In a subsequent case decided by the same learned Chief Justice, the doctrine was more distinctly expounded. The devise was in the following words : “ I give and bequeath my freehold house, with the appurtenances, &c. and all the furniture thereto belonging, to E. Gibson, whom I make executrix of this my last will, she paying all my just debts, and funeral expences and legacies before-mentioned, in twelve months after my death. I also leave to the said E. Gibson, all the rest and residue of my personal estate.” The Judge before whom the cause was tried, being of opinion that the devisee took a fee by reason

<sup>7</sup> *Freak v. Lee*, 2 Show, 38.

<sup>8</sup> *Doe d. Palmer and others v. Richards*, 3 T. R. 356.

of the words, " The paying all my debts, &c." nonsuited the plaintiff. And on a motion to set aside the nonsuit, Lord Kenyon thought the direction perfectly right; observing, that in cases of this kind, the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee only takes an estate for life, but in the latter he takes the fee; otherwise he might be a loser by the devise. The devisee, in the case under consideration, was bound to pay the debts and legacies at all events, and the charge was thrown on her in respect of the real estate<sup>a</sup>.

Where lands are devised with a direction that the devisee shall make a *perpetual* yearly payment thereout, if the devisee were not to take an estate commensurate with the charge, he could not fulfil the testator's intention. Accordingly where one devised lands to C. his younger son, and directed that C. should pay annually to the elder son B. *and his heirs*, three pounds; it was resolved that this was an estate in fee<sup>b</sup>. So in another case, where lands were devised to J. and S., who were to pay yearly to the Merchant Taylors' Company in London, six pounds ten shillings, it was resolved that the devisees took a fee-simple, by reason of the annual payment, without any regard to the greatness or smallness of the sum; for as the charge

So also where the devisee is charged with a perpetual annual payment.

<sup>a</sup> Doe d. Willey v. Holmes, 8 T. R. 1. See also Goodtitle d. Paddy v. Madden, 4 East, 496. The distinction has turned in all the cases on this—whether the debts, &c. were merely a charge on the estate devised, or a charge on the devisee himself, in respect of such estate in his hands, per Lord Ellenborough.

<sup>b</sup> Shallard v. Baker, Cro. El. 744.

continued for ever, the estate must continue so too, as without the estate, the charge could not continue<sup>c</sup>.

Or with the payment of an annuity for the life of another.

And although the annual payment to which the land is subjected, is to continue only for the life of another, the devisee of the land must have the fee; for otherwise the annuity might fail before the death of the person for whom it was intended. Thus, where a testator, after giving several legacies, gave to Mary Ramsey the sum of twenty shillings a year, for and during her natural life, to be paid by his executors; and gave his two yard-lands, with his house and homestead, and all the residue and remainder of his goods, chattels, and personal estate, to Thomas Allen, he paying his debts, legacies, and funeral expences, and made Allen his executor, the devise to Thomas Allen was adjudged to be of an estate in fee in the lands, because the annuity was given to Mary Ramsey, for her life, to be paid by the executor, which must have an estate to support it; and, as the devises to Allen followed each other immediately, they must be construed as one clause, so that the payment of debts and legacies was charged on the real as well as the personal estate<sup>d</sup>.

And in another case, where a testator gave his two copyhold tenements to Sarah Boreham, she paying thereout forty shillings a year to her sister Elizabeth Boreham, though the gift of the annuity to E. B. was not expressed to be for her life, yet, there being reasons enough afforded by the other parts of the will for construing it to be so intended, it was held that the

<sup>c</sup> *Webb v. Hearing*, Cro. Jac. 415., and *Smith v. Tendall*, 11 Mod. 90. 2 Salk. 685.

<sup>d</sup> *Goodright v. Allen*, 2 Blackst. 1041.

annuity to Elizabeth, made it a devise in fee to Sarah\*.

Upon a principle similar to that which is the true solution of the class of cases just above considered, it is held, that if lands are devised to trustees, for purposes which require them to have the fee-simple in them to perform, the estate in fee will pass without any words of limitation; for, as Lord Hardwicke has observed, it has often been determined that, in a devise to trustees, it was not necessary that the word *heirs* should be inserted, to carry the fee at law; for if the purposes of the trust could not be satisfied without having a fee, courts of law would so construe it<sup>f</sup>.

By a devise to trustees for purposes which require the fee, the fee passes without words of limitation.

Of chattels real a general devise, without any words of limitation or declaring any estate, passes the whole interest of the devisor<sup>e</sup>. If such property be devised to another for his life, and no intention appear to dispose of the whole interest, a possibility of reverter is left in the executors of the testator, to take effect upon the death of the devisee within the term. But a devise in a form of limitation which would pass the inheritance in tail, if it were a freehold estate, will carry the absolute interest in a term or chattel interest<sup>h</sup>. For the remainder of a term cannot be made to depend upon a possibility so remote as the failure of issue,

\* *Baddeley v. Leppingwell*, 2 Burr. 1531. *Wilmot*, 223. and *Goodright d. Baker v. Stocker*, 5 T. R. 13.; same point determined accordingly, and see *Andrew v. Southouse*, 5 T. R. 292.

<sup>f</sup> *Gibson v. Montfort*, 1 Vez. 485. *Shaw v. Wright*, 1 Eq. C. Abr. 176., and see *Oates v. Cooke*, 3 Burr. 1684. *Chapman v. Blissett*, Ca. temp. Talbot, 145.

<sup>e</sup> *Fenton v. Foster d. Dyer*, 307. a. Roll. Abr. 831.

<sup>h</sup> *Seale v. Seale*, 1 P. Wms. 290. *Butterfield v. Butterfield*, 1 Vez. 133. 154.



and therefore the interest must stop with the first taker.

As to the force and operation of the preamble, or introductory words in a will.

With respect to the force and operation of the preamble and introductory words in a will, after some fluctuation it is at length clearly settled, that although they make profession of disposing of all the testator's property, in the fullest manner, they will not operate to carry the words of the devising clause beyond their legal sense and signification. If the testator commences his will with saying, "as touching the disposition of all my temporal estate," (6) this will not of itself cause a devise of a house to A. without any words of limitation, to be construed an estate in fee-simple<sup>1</sup>. But if the words used in the devising part of the will, though not proper and technical, are yet sufficient to carry the interest contended for; as, where a testator, after saying "as to all my worldly substance," by the residuary clause of his will devised to his mother *all the remainder and residue of all his estate and effects both real and personal*, the mother was held to take the fee<sup>2</sup>. But in a subsequent case, where a testator devised thus, "as to all such

<sup>1</sup> *Frogmorton and Wright v. Wright*, 2 Blackst. 889.

<sup>2</sup> *Hogan v. Jackson*, Cowp. 290.

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(6) In the case of *Tanner v. Morse*, Ca. temp. Talbot, 284. it was contended that these words *temporal estate* in the introductory clause, in a strict sense, related only to estates of a certain duration, and that were to continue for a time only; but the Chancellor treated this as a very fallacious construction, the word *temporal* being the same as *worldly*, and used in opposition to the word *eternal*. There could not be a better specimen of the vain disputations which sometimes find their way into courts of justice.

*worldly estate as God has endued me with, I give and bequeath as follows :—I give and devise all that my freehold messuage and tenement lying in G. together with all houses, &c. and appurtenances whatsoever, belonging to the same, to M. R., G. R., and T. R., my sister's sons, equally,"* and then, amongst other pecuniary legacies, gave the sum of ten shillings to his heir at law; Lord Mansfield, after saying that he suspected extremely that the testator meant to give his nephews a fee in the premises, for he had no other landed property, and had given a disinheriting legacy to his heir at law, agreeably to the vulgar notion taken from the Roman law, that the heir is to be cut off with a shilling (7), yet declared it to be impossible to find words in the will before him sufficient to controul the rule of law. Whatever the testator might intend, the misfortune was that *quod voluit non dixit*. The testator had not said that he meant *to dispose of* all his worldly estate; and there were no words that would connect the devise of the lands in question with the introduction so as to pass the whole interest: therefore the devisees would only take a life estate<sup>1</sup>. In the subsequent case of *Right v. Sidebotham*<sup>2</sup>, the same Chief Justice declared himself bound by the decision of the case last-mentioned, and accordingly, with the concurrence of the other Judges, decided in the same way.

<sup>1</sup> *Denn d. Gaskin v. Gaskin*, Cowp. 657.

<sup>2</sup> *Dougl.* 759.

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(7) Vid. Vin. c. 2. tit. 18. de inofficioso testamento.

In *Ibbetson v. Beckwith*<sup>a</sup>, where considerable stress was laid by Lord Talbot on the introductory words, we are to observe that the testator devised by the word *estate*, the force of which word we have already discussed, and the introductory clause contained words which Lord Mansfield treated in the case of *Denn v. Gaskin* as very material; for there the testator expressed his intention *to dispose of* his worldly estate. But in the case of *Frogmorton v. Wright*, already cited<sup>o</sup>, where the writ begun with the words “as touching the *disposition of all* my temporal estate,” no attention was paid to this distinction, nor has it been treated since with any regard.

And although the word *estate* may be used by a testator in the devising clause of his will, yet if there is ground for inferring from the whole of the contents that the real estate was not intended to be devised, the general introductory words, though embracing in the fullest manner the property, *both real and personal*, will not overrule the inferences deducible from the whole tenor of the instrument. As, when a testator begun his will thus, “as to all my estate and effects both real and personal,” and then proceeded, by a residuary clause, to give all the rest of his estate and effects of what nature soever, to A. and B., their *executors and administrators*, in trust to add the *interest to the principal*, and so to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4000*l.* (before given to A. and B.) was directed to be paid, it was held that a house, the only freehold of which the testator was seised, did not pass by the will; and

<sup>a</sup> *Ca. Temp. Talb.* 157.

<sup>o</sup> 2 Blackst. 889:

Lord Kenyon observed that the testator set out in the beginning of his will as if he meant to dispose of all his property ; but though these general words would have shewn his intention if there had been subsequent words in the will to carry that intention into execution as had been said by Lord Talbot in *Ibbetson v. Beckwith*, it had been held in a variety of cases that alone they are not sufficient to dispose of a fee ; and by adverting to the residuary clause, there were no words to pass the estate in question. The testator only meant that that should extend to his personal estate. It was given to trustees, their *executors and administrators*,—technical terms applicable to *personalty*. But “I rely,” said his Lordship, “on the following words of the clause, ‘to add the interest to the principal so as to accumulate the same.’ The interest and principal were to make one consolidated sum of the same nature, and are terms wholly inapplicable to real estate. Seeing, therefore, that there is nothing in the residuary clause to pass this estate, and that there is nothing in the will to make it necessary for the trustees to take it to perform any trust in them, the heir at law stands intrenched in his right as heir, and cannot be removed from it.”

The importance of the introductory clause as manifesting an intention of complete and ultimate disposition, has been gradually declining in Courts both of law and of equity. In the case of *Goodright d. Baker v. Stocker*<sup>1</sup>, Lord Kenyon laid a very slight stress upon it, observing that, though the general introductory words would have *some* effect in the construction of the subsequent devises, as had been said

By the later cases, the importance of the introductory clause appears to have been less considered than formerly.

by Lord Talbot in a case before him, they could not of themselves have carried the fee. In another case<sup>1</sup> Lord Ellenborough, in adverting to the effect of this clause, observes, that the construction might be considered as *in a degree* aided by the introductory words of the will respecting his worldly and temporal estate, &c. which, said his Lordship, “are allowed to have *some* weight in cases where the intention of the testator is doubtful, and where there are other words in the will to carry his intention into effect.”

In the case of *Goodright d. Drewry v. Barron*<sup>2</sup>, which has been already cited for another purpose, the imbecility of this introductory clause was still more marked. There the testator after the introductory words “as touching my worldly estate, &c.” devised a cottage, house, &c. to A. and his heirs, and also gave to B., whom he made his executrix, “all and singular his lands, messuages, and tenements by her freely to be possessed and enjoyed”, it was held that the latter words, being ambiguous, did not pass the fee against the heir, and that the word estate in the introductory clause, could not be brought down into the latter distinct clause. With respect, said the Chief Justice, to the introductory words, it has been held in many cases that they are not sufficient of themselves to carry a fee; but *juncta jvant*. And Mr. J. Le Blanc observed that the introductory words were a circumstance *with others*, from whence the testator’s interest might be collected.

Finally, in the case of *Doe d. Wall v. Langlands*<sup>3</sup>,

<sup>1</sup> *Doe d. Bates, v. Clayton*, 8 East, 147.

<sup>2</sup> 14 East, 372.

<sup>3</sup> 14 East, 372.

it was said by the present Chief Justice, that "very little inference of intention can be drawn from mere formal words of introduction, though we certainly find them in some cases called in aid to shew that a man did not mean to die intestate as to any part of his property; and the making a will at all may also be used as affording such inference."

The effect of the words usually employed in the residuary clause is deserving of some consideration. In *Tanner v. Morse*, (8) the testator devised in the following words "As to my temporal estate, I bequeath to my nephew T. (the testator's heir at law), 50*l.*" then, after several legacies, he concluded thus: "And all the *rest and residue* of my estate, goods and chattels whatsoever, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix." It was contended that as to the words "All the rest and residue of my estate," they must have *relation to something that went before*, and there was nothing disposed of in the will before that clause, but only some legacies charged upon the personal estate. Lord Talbot, however, decreed an estate in fee-simple to pass by the words of the will, considering the introductory clause followed by the devising words, as amounting to the same as if the testator had said; "I devise the rest and residue of all my temporal estate." And, indeed, it never has been doubted that if by necessary or fair construction the introductory words "As to all my worldly estate, substance, &c." are fairly to

Of the effect of the residuary clause.

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(8) Ca. Temp. Talbot 264. Before Lord Chancellor King, and afterwards affirmed by Lord Talbot on a rehearing: reported in 3 P. Wms. 295, by the name of *Tanner v. Wise*.

be construed as connected with the devising words that follow, the fee-simple passes under them ; for then it is really a *disposition by*, and not merely an *introduction to*, the will.

How far  
the residu-  
ary words  
are to be  
considered  
words of  
relation.

It is observable that in the last-mentioned case, as it is reported in *Peere Williams*, Lord Talbot appears to have adopted the argument of the counsel, that *rest* and *residue* were mere words of relation, having a necessary reference to some property of the testator before-mentioned in the will.

But Lord Holt expressed a different opinion in the case so much above referred to, of the Countess of Bridgewater *v.* the Duke of Bolton<sup>1</sup>, wherein he said that it might be objected that the word *residue* was a word of relation, and therefore to be confined by its relation to something given before. But this he denied, and said " Suppose a man gives some of his personal estate away by will, and in the same will, gives the residue of his estate, real and personal, away, should not this pass the freehold as well as the rest of his personal estate? Surely there is no doubt of it." " And," said his Lordship, " Considering the last clause of the will, whereby he orders these *rents*, in case of deficiency, &c. to be sold, and the remainder thereof, after the debts and legacies paid, to go to the Earl: I say, considering this clause, with other scattered clauses in the will, the rents thereby will pass. Some doubts have been made whether the word ' *remainder* of my rent' be sufficient to pass these rents: because a *remainder* is a residue of something; so that if there be nothing sold, there can be no *residue* or *remainder*. But this depends upon the construc-

<sup>1</sup> See 6 Mod. 108.

tion of the word '*remainder* ;—whether there be a necessity to sell to make a remainder. But I do not think that the word *remainder*, here, is to be taken for a *remnant of a totum*, when part is extracted from it; for if the rents are not sold, then they remain unsold, and the word *remainder* shall be understood for the rents remaining unsold. This word *remainder* made some dispute which lasted for above an age. It was a great question whether there could be a remainder of a thing created *de novo*", and which never had been before. Since, a more reasonable construction has been made. If a man by deed grant a rent to A. and the heirs of his body, remainder to B. and his heirs, this is a good remainder'."

There can not be a doubt, it is humbly apprehended, of the propriety of these observations of Lord Holt; which may be reconciled with those of Lord Talbot, above alluded to, by attending to the following distinction.

Lords Holt and Talbot reconciled as to this point.

The words, *rest*, *residue*, and *remainder* are not to be considered as mere words of relation, when the question is, *what subjects* are included under them; for it seems clearly settled, not only that property of the testator not before mentioned by him will pass under the residuary devise, unless there is something in the will itself to limit and contract its compass to the extent of the descriptive words used, but property not distinctly in the contemplation of the testator at the time. Thus M. C. made her will, duly executed for passing freehold estates, and hereby gave devised and bequeathed all and every the

" Plowd. 35.

" 1 Sid. 285. Co. Litt. 241. a note, (4). 298. a note, (2).

" 1 Hen. Blackst. 223.



real estates, which she was any ways seised of, interested in, or entitled unto, late the estate of W. N., to certain persons, in manner therein mentioned, and she gave to other persons other messuages, &c. by particular local descriptions: she then gave several pecuniary and specific legacies, and afterwards devised and bequeathed all the *rest* and *residue* of her estate, of what nature and kind soever, unto C. for her life, with limitations over to other persons. The testatrix died soon after making her will, seised of eight acres of freehold, and four of copyhold lands of inheritance, in the parish of Chertsey, which were the lands in question, and not particularly devised by the will. She had duly surrendered the copyhold to the use of her will. In this case there was no difficulty in construing the lands, of which there was no mention made in the will, as passing by the words "All the rest of my estate, of what nature or kind soever."

So also in the case of *Goodright d. Earl of Buckinghamshire and others, v. Marquis of Downshire*<sup>\*</sup>, the Court recognized the principle laid down in many antecedent cases, particularly in *Smith d. Davis v. Saunders*<sup>†</sup>, that a residuary clause will extend to every *latent* reversion which the testator might have in him, unless it be expressly excluded by devise to some other person.

But when the question is, not as to the *particular parts of the property*, but as to the *quantity of interest*, which passes to the devisee by the residuary clause, it may frequently be of importance to consider the words, 'rest,' 'residue' and 'remainder,' in their relation to the things mentioned in the preceding

<sup>\*</sup> 2 Bos. et Pull. 600.

<sup>†</sup> 2 Blackst. 736.

parts of the will. For if these words are considered alone, without any aid from the introductory words of the will, or the descriptive words used in designating the property, they are incapable, of themselves, of passing the absolute interest.

Thus in the case of *Canning v. Canning*<sup>a</sup>, where the words were, “*all the rest, residue and remainder* of my messuages, land, or hereditaments whatsoever and wheresoever, unbequeathed after my just debts legacies and funeral expenses are paid, I give to my executors, in trust for my daughters, &c.” it was adjudged that the executors took only a life estate; for the words “*all the rest,*” &c. comprehended the particulars only, and not the estate. So where the words were “*all the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever, after payment of my just debts, I give, devise and bequeath the same unto my wife, S. C., and I hereby nominate and appoint my said wife sole executrix of my will,*” it was adjudged that the wife only took an estate for life<sup>a</sup>. And in the case of *Doe d. Palmer, v. Richards*<sup>b</sup>, where the devise was of “*all the rest, residue and remainder of my lands, hereditaments, goods, chattels and personal estate,*” it was admitted by Lord Kenyon that these words alone were not sufficient in law to carry a fee.

But where a testator makes a partial disposition of his interest in a thing, whether it be a chattel or hereditament, and afterwards devises or bequeaths the “*rest, residue and remainder,*” &c. then these words may properly be considered as having a specific relation to what has gone before; and standing in this

<sup>a</sup> Mosel. 240.

<sup>a</sup> *Denn v. Mellor*, 5 T. R. 558.

<sup>b</sup> 3 T. R. 356.

light, they seem to have been always held to carry the whole of the testator's remaining interest. And thus Lord Holt and Lord Talbot may be reconciled by adverting to the difference between a specific relation,—as that which exists between an individual whole and its component parts, and that more general relation that exists between the several particulars which compose a numerical quantity. When *rest* or *residue* are used to signify this latter relation, the words import only the things devised, but when they denote the former species of relation they imply the quantity of interest remaining in the testator.

Thus in *Grayson v. Atkinson*<sup>c</sup>, where a testator began his will thus—as to all my temporal estate where-with it has pleased God to bless me, I give and devise the same as follows :—and then gave several legacies to A. ; and directed him to sell all or any part of his real and personal estate for the payment of his debts and legacies, and concluded with giving, “ all the *rest* and *residue* of his goods and chattels *real* and personal, moveable and immoveable, as houses, gardens, *tenements*, to A.” without using the word *estate*, or any words of limitation, Lord Hardwicke, though he doubted at first, was afterwards clearly of opinion, that A. took a fee in the realty.

So in *Hogan d. Wallis v. Jackson*<sup>d</sup>, where, after beginning with the usual introductory words, “ As to all my worldly substance,” the testator gave to his mother *his house and lands of G. for the term of her natural life, without the liberty of committing waste thereon*, and gave other lands to her in the same manner, and after several legacies and annuities, devised to his mother, *all the remainder and residue* of all his

<sup>c</sup> 1 Wills. 333.

<sup>d</sup> Cowp. 290.

effects, both real and personal, which he should die possessed of, the mother, by the residuary clause, was adjudged to take the fee in the testator's fee-simple estates (9).

In both the last-mentioned cases, we find the usual general introductory words; but as it has long been settled that these words can only assist, and not enlarge, the succeeding devises, or enable them to pass more than the words themselves are equal to, it follows that these residuary words were considered as, of themselves, capable in law of carrying to the devisee the whole interest, when the context shews this to be the intention; and such intention appeared in these cases by the relation of the residuary words to a preceding partial disposition of the property.

In the case of *Norton v. Ladd*\*, upon a devise to A. for life, and after her decease the whole *remainder* of the lands to B., it was held that a remainder in fee-simple passed. And that case has never been doubted.

Of the devise of a remainder or reversion.

And upon a principle similar to that which has above been endeavoured to be explained, it seems, that when a testator has nothing but a *reversion* or re-

\* 1 Lutw. 755.

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(9) It was strongly contended that as the mother had a specific estate for her life, and that estate was made liable to impeachment for waste, such particular disposition to her was totally repugnant to, and inconsistent with, an intention to give her the absolute property in a subsequent part of the same will. But this argument was not suffered to prevail, and was considered by Lord Mansfield as answered by the decision of *Ridout v. Paine*. 3 Atk. 486.

*mainder* in fee, in the land, and devises it as such, the whole interest passes to the devisee; for though the will may have made no previous devise of a partial interest out of the subject, yet the words "reversion, or remainder," naturally imply the quantity of interest remaining in the testator, after the determination of the antecedent estate or estates.

Accordingly, in the last cited case of *Norton v. Ladd*, it was said, that the devise of a *reversion* carried the fee. And where a testator devised thus "I give to my son C. G. the reversion of the tenement my sister now lives in, after her decease; and the reversion of those two tenements now in the possession of J. C." Lord Hardwicke declared his opinion that the word *reversion* passed the fee<sup>f</sup>. "The interest," said his Lordship, "which the testator had in it, was the reversion in fee which he had in himself, expectant on those leases which he had granted, whether for life, or for years. '*Reversion*' was the right of having the estate back again, when the particular estate determined: it was descriptive of the right of reverter by way of eminence, that was in himself; consequently there was no ground to split or divide it. Giving the reversion was giving the *whole* reversion, unless words are added limiting and restraining the interest."

Thus also, in the case of *Cole v. Rawlinson*<sup>g</sup>, Lord Treby observed that it had been lately adjudged in the Common Pleas, that when I. S. having a *remainder* in fee devised all his *remainder* to I. N., a fee passed to the devisee. And, where the Bell Tavern was settled upon A. for life, remainder to B. in tail,

remainder to A. in fee, and A. devised all the house called the Bell Tavern to B. without saying for what estate, it appears by a note in Viner<sup>a</sup>, that the fee was held to pass.

I pass over the cases wherein the word *estate* has occurred in the residuary devise, as improper examples of the force of the devising residuary words; since that term, of itself, embraces the absolute fee-simple in a will.

The effect of the residuary clause is very different in respect to real and personal estate. Which important distinction is clearly and fully stated by Sir William Grant, in the case of *Cambridge v. Rous*. His words are as follow: "The third question upon the will of S. is, whether the particular legacies, lapsed by the death of M., fell into the residue, and pass by the residuary clause, or belong to the next of kin, as undisposed of. It has been long settled that a residuary bequest of personal estate, (for it is otherwise as to real) carries, not only every thing not disposed of, but every thing that, in the event, turns out to be not disposed of. And this, not in consequence of any direct or expressed intention; for it may be argued in all cases, that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given away from him: no, for he does not contemplate the case: the residuary legatee is intended to take only what is left; but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the

*Of the different effects of the residuary clause, in respect to real and personal estate.*

<sup>a</sup> 3 Vin. 209. tit. Dev. (L. a) pl. 29.

particular legatee. The testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee. In the case of lapse of *real* estate, the heir at law takes; but in the case of personal property the residuary legatee is preferred either to the next of kin, or the executor."

It is, therefore, the settled rule of construction, that, as to personal estate, whatever is not effectually taken out of the bulk of the property, falls into the residuum, and passes by the general bequest thereof. Nor does it signify whether the particular legacy becomes ineffectual by the death of the legatee in the testator's lifetime, or by the disposition itself being void in law.

In *Brown v. Higgs*<sup>1</sup>, one of the bequests of the will was void under the statute of mortmain, and it was without difficulty determined that the subject of the void bequest passed to the residuary legatee: and to what was observed, as to the testator's not meaning to include in the residue what he imagined himself to have previously disposed of, it was said by the Master of the Rolls, that the same argument might be urged in the case of lapsed legacies; for no man supposes his legacies will lapse, or will not take place. And, in *Shanley v. Baker*<sup>2</sup>, in the same court, the authority of *Brown v. Higgs* was recognized and confirmed. And again in *Crooke v. De Vandez*<sup>3</sup>, the particular phrase of "what remains" used by the testator, being held to be tantamount to the word *residue*, and to include every thing not already disposed of, personal

<sup>1</sup> 4 Vez. Jun. 708.

<sup>2</sup> Ibid. 732.

<sup>3</sup> 11 Vez. Jun. 330.

estate, bequeathed upon a contingency too remote, was held to pass under them to the residuary legatee.

There is not any distinction as to this effect of the residuary bequest between specific and general legacies. And where a man by his will<sup>m</sup> gave and bequeathed all the *rest and residue* of his real and personal estate, whatsoever, and wheresoever, and of what nature or kind soever the same might consist of, *not therein before specifically disposed of*, the general devise was held to comprehend *specific* legacies lapsed, upon the ground that the word *specifically* ought to be construed 'particularly.' The Master of the Rolls being of opinion clearly, that the testator was not to be interpreted as meaning to die intestate with regard to all sums specifically bequeathed, and testate with regard to all pecuniary legacies.

But if a devise of *real* estate becomes ineffectual from lapse, it is considered by the law as undisposed of; and, having been separated from the residue at the time that the will had an incipient operation, in the nature of a conveyance, it cannot be brought again into it by a subsequent event. And where a testator manifests his intention to make a particular disposition of a real estate, and such disposition is void in law, still it will not pass inclusively in the residue, unless under special circumstances overruling the inference of intention to separate it from the residue. Thus in a case<sup>a</sup> where the testatrix, having four sisters, devised particular estates to them, with remainder to her own

<sup>m</sup> *Roberts v. Cooke*, 16 Vez. Jun. 451.

<sup>a</sup> *Amesbury v. Brown*, cited 2 Black. 739.



right heirs, and afterwards gave the residue, in a general residuary clause, to one of the sisters, and died, having no other real estate; upon one of the particular estates determining, it was held that the reversion did not pass by the residuary clause; for though the devise might not operate to make the heir take by purchase, (10) yet it was in the nature of an exception out of the residuary clause, which determination was approved by Lord Northington and confirmed by the Court of K. B. in *Smith d. Davis v. Saunders*°.

° 2 Blackst. 736.

Of the devise to the heir—when he takes by the will—when by descent.

(10) Where the same estate is devised to the heir in quantity and quality, as he would have taken by descent if there had been no devise, the devise is void, and the heir will take by descent. But where by the devise a different estate is given from that which the law would give, the will prevails; as where a man devises to A. and B., his daughters and co-heirs, in fee: for instead of an estate in coparcenary, they take as joint-tenants, with survivorship. So, if the devise be to them, as tenants in common. And if a man devise to one of several co-heirs of himself; in as much as one co-heir cannot take without the others by descent, the whole shall pass by the devise. If a devise be to the heir and another in fee, the heir takes by purchase, for he takes subject to survivorship in a stranger. But if a testator devise to his heir and another, as tenants in common, it seems that the devise to the heir, as to his moiety, is void, for he takes the part devised to him just in the same manner, as if it had been left to descend to him. And, where lands are subjected to a charge by a will, with a devise to the heir in fee, it seems that the heir will still take by his title of descent, and not by purchase; and that if it is subjected to a temporary right of possession in another, until the heir pays a sum of money, and then is devised to the heir in fee, still the heir takes according to his better title, i. e. by descent. See *Fearne's posthumous Works*, 226. 229. and see *Reading v. Rawstorne*, 2 Lord Raym. 4th Ed. 829.

## SECTION V.

*By what words an Estate tail passes.*

IN conformity with the principle of giving effect to the intention, an estate tail, as well as an estate in fee, may be created in a will by expressions, be they ever so informal, that manifest the meaning of the testator. To discuss the varieties into which the cases in the books have expanded the doctrine, would require volumes of learned labour ; the reader can expect only the general heads of this multifarious subject to be treated of in this place.

An inheritance in tail general, is properly created in a deed where lands or tenements are given to a man, and his heirs of his body begotten. And this estate, according to Littleton<sup>a</sup>, “ is called general tail, because whatsoever woman such tenant in tail taketh for wife, (if he hath many wives, and by every of them hath issue,) yet every one of these issues, by possibility, may inherit the tenements by force of the gift ; because every of such issue is of his body engendered.”

The formal words of limitation whereby estates tail are to be created.

“ In the same manner it is,” says the same author, “ where lands or tenements are given to the woman, and to the heirs of her body ; albeit that she hath divers husbands, yet the issue which she may have by

<sup>a</sup> Sect. 14, 15.

every husband may inherit as issue in tail by force of this gift, and therefore such gifts are called general tails."

He then defines the tenancy in tail special to be, "where lands or tenements are given to a man and his wife, and to the heirs of their two bodies begotten; in which case, none shall inherit by force of this gift, but those that be engendered between these two. And it is called *special* tail, because, if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherit by force of this gift, nor the issue of the second husband if the first husband die."

Of the necessary words in a deed to create an estate tail.

These estates tail, whether general or special, are not, in general, to be created by a gift inter vivos, without the words of limitation used by Littleton, as above stated; for every estate tail was a fee-simple at common law, and at common law, no fee-simple could be conveyed by feoffment or grant without the word *heirs*; and to the word *heirs* must be added words to express from whose body the heirs intended are to spring (1).

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(1) Yet, says Lord Coke, if a man give lands to A. et hæredibus de corpore suo, the remainder to B. in formâ prædictâ, this is a good estate tail to B., for, in formâ prædictâ do include the other. If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. in formâ prædictâ; this remainder is void for the uncertainty. But if the remainder had been to C. in eadem formâ, this had been a good estate tail, for idem semper proximo antecedenti refertur.

The words 'of his body' are not so strictly required, even in a deed, but that they may be expressed by others which are tantamount; for the example which the statute de donis puts, has not the words *de corpore*. The words are these—cum aliquis dat ter-

Therefore, if a man by deed give lands or tenements to A. and to his seed, or to the issues, or children, of his body, or to the issues of his body lawfully be-

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ram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis. Therefore, if lands be given to B. et hæredibus quos idem B. de prima uxore sua legitime procrearet, this is a good estate in especial tail, (although he hath no wife at the time,) without the words *de corpore*. So it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man et hæredibus de carne sua, or to a man et hæredibus de se. In all these cases, these are good estates tail, and yet the words *de corpore* are omitted.

The word *begotten* may in many cases be omitted in a deed; and though Littleton says, ingendered, or begotten, yet if the words be, 'to be begotten,' or, 'whom he shall have begotten,' the estate tail is good; and, as procreatis shall extend to the issues begotten afterwards, so procreandis shall extend to the issues begotten before. Co. Litt. 20. b.

If lands be limited by deed to the use of J. S. et hæredum masculorum suorum legitime procreatorum, remainder over, it is a fee-simple; but if it be hæredum masculorum *de se*, or in English, *the heirs of him lawfully begotten*, especially where there is a remainder over, it is tail. Bedell's case, 7 Rep. 41. Where the premises in a deed come short of the full description, provided they have the word 'heirs,' the habendum may supply what is wanting to make the estate tail; as if lands be given to B. and his heirs, to have and to hold to him and the heirs of his body, or if lands be given to B. and his heirs, to hold to B. and his heirs if B. have heirs of his body, but if he shall die without heirs of his body, that they shall revert to the donor; thus has been adjudged an estate tail. See Co. Litt. 21. a. and the note by Mr. Hargrave, 124.

It seems that a limitation in a deed to a man and to the heir of his body in the singular number, gives him an estate tail. See Co. Litt. 22. a. and *Richards v. Lady Bergavenny*, 2 Vern. 235. And, according to many authorities, *heir* may be nomen collectivum as well in a deed as a will, and operate in both in the same manner as heirs in the plural number; for which see the several authorities referred to by Mr. Hargrave, in note to Co. Litt. 8. b.

gotten, A. has but an estate for his life<sup>b</sup>. And if a conveyance be to a man and his heirs male, he thereby takes a fee-simple without regard to the word male.

What words are sufficient in a will to create an estate tail.

But in a will, if A. devise land to B. and his heirs male, the law will supply the words '*of his body*,' and make it an estate tail<sup>c</sup>. And if land be devised to B. and his *issue*, or to his *children*, and B. had none at the time of the devise, he takes an estate tail; for the intention to give to the children the land by such a devise is plain; and they cannot take as immediate devisees, not being in existence; nor by way of remainder, for the devise is immediate to B. and his children; therefore the words must be taken as words of limitation, that is, as vesting an estate tail in the parent<sup>d</sup>.

In the case last supposed there is no way of executing the intention of the testator, but by giving the parent an estate tail; but if B. *has issue living*, and land is devised to B. and his issue, or children, the intention of the testator to give an immediate estate, may be effectuated by a joint estate being executed in B. and his children, and there being no words of inheritance to indicate an intention to give more than a life estate, they take only as joint-tenants for life.

Again, if the devise be to B. for his life, or to B. generally, and *after his decease* to his children, or *remainder* to his children, he having a son or daughter, the father takes but an estate for life, with remainder to his children for life; for no greater estate

<sup>b</sup> Yent. 228, 229.

<sup>c</sup> Co. Litt. 20. b.

<sup>d</sup> 6 Rep. 17.

would have passed by these words at common law, and to make a will operate differently from a conveyance at common law, the intent of the testator must appear<sup>e</sup>.

Where lands are devised to another generally, and without any words expressive of the interest he is to take, he thereby becomes entitled only to an estate for life. Nor will a greater estate pass to the devisee by a devise to him and his assigns. But if after such general devise the testator shews his meaning to be, though expressed in the loosest terms, to continue the estate in the descendants of the devisee, his estate will be enlarged so as to carry such intention into effect.

Thus where a house was devised to three brothers, among them ; provided always that the house be not sold, but go to the next of the name and blood : it was resolved that the devisees took estates tail<sup>f</sup>.

And where a person devised land to his three daughters, to be equally divided ; and if any of them died before the other, then the one to be the other's heir, equally to be divided ; and if his three daughters died without issue, then he willed it to two strangers : it was adjudged that the daughters took estates tail<sup>g</sup>.

A person devised land to his wife for life, and after her decease to his son ; and if his son died without

<sup>e</sup> Wild's Case, 6 Rep. 17.

<sup>f</sup> Chapman's case, Dyer, 333.

<sup>g</sup> King v. Rumball, Cro. Jac. 448.

issue, *having no son*, that another should have it: it was adjudged that the son took an estate in tail *male*<sup>b</sup>.

R. J. being seised in fee of a copyhold of inheritance which he had surrendered to the use of his will, devised to J. Wedgeborough his house in the Brook, and 30*l.*, and then gave other pecuniary legacies; and to William Taylor, his sister's son, a house by the description of his "house on the green, with the ground and out-houses thereto belonging," and declared his will and meaning to be, that if either of the persons before-named died without issue, lawfully begotten, then the said legacy should be divided equally between them that were left alive: adjudged that William Taylor took an estate tail<sup>c</sup>.

A man having issue two sons, devised all his land to his eldest son; and, if he died *without heirs male*, then to his other son in like manner. The court observed that the words 'of his body,' which properly created an estate tail, were left out; but that the intent of the testator might be collected out of his will, that he designed an estate tail; for, without this devise, it would have gone to his second son, if the first had died without issue. It was therefore an estate tail<sup>k</sup>.

A. devised to the three sons of C. D. successively, in tail male, remainder to every son and sons of the said C. D. which should be begotten on the body of Sarah his wife. And *for want of such issue* to

<sup>b</sup> Robinson v. Miller, 1 Roll. Ab. 837.

<sup>c</sup> Hope ex. dem. Brown v. Taylor, 1 Burr. 268.

<sup>k</sup> Blaxton v. Stone, 3 Mod. R. 133.

W. N. &c. with a proviso that the devisees and their descendants should take the surname and arms of the testator. The Court of King's Bench resolved that the afterborn sons took several estates in tail male, in succession; as the words "for want of such issue," must be construed 'for want of heirs male of the body,' and that this was the true construction<sup>1</sup>.

A person devised in these words: "I give and bequeath all my copyhold lands to my nephew Isaac Slater; but, if the aforesaid Isaac Slater shall die *without male heir*, then my will is, that my nephew John Slater shall enter upon and enjoy the said copyhold lands, his heirs or assigns, for ever; provided the aforesaid Isaac Slater paid to his wife Elizabeth Slater, the sum of 8*l.* a year, during her life; with a power of entry to the wife if the annuity was not paid. It was contended, that Isaac took a fee by reason of the annuity. But Lord Kenyon said, it was clear from all the cases on the subject, that Isaac Slater took an estate tail.

And although the testator gives to the devisee an express estate for his life only, such estate will nevertheless be enlarged into an estate tail to give effect to the general intent of the testator by embracing the ulterior objects of the deviser, within its legal extent and duration.

What words will enlarge an express estate for life into an estate tail.

A. Dymock devised to his nephew William all his freehold estate at A. to hold to him during his natural life; and, after his decease, to and amongst his is-

<sup>1</sup> Evans v. Astley, 3 Burr. 1570.

<sup>2</sup> 1 Vent. 230.



sue; and, in default of issue, to be divided between his nephew E. and his niece M. and to their heirs and assigns for ever". Lord Kenyon said, that although this will was very inaccurately drawn, he thought the devisor's *general intention* might be collected from the words of it: the great question in the case was, what estate W. Dymock took under the will. In the first clause the estate was expressed to be given only during his natural life, but in the next limitation it was to go to his issue, and in default of issue it was to go over; it was clear, therefore, from the whole of the will, that the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in W. Dymock. He therefore thought that the Court was warranted by many determinations, and particularly by that of *Robinson v. Robinson*<sup>\*</sup>, to give that effect to the will which would best answer the devisor's *general intention*; though, by so doing, they might defeat some *particular intention*. Here the *general intent* was, that W. Dymock and his issue should take first; then what construction would best effectuate that intention. It had been argued by the plaintiff's counsel that W. Dymock took only an estate for life, and his children an estate tail: but it would be difficult to put two different interpretations on the word 'issue:' and, even if that could be done, it would not further the intention of the devisor, for there were no cross remainders to the children, and they never can be supplied; so that, according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived; which was certainly not intended by the de-

<sup>\*</sup> *Doe v. Applin*, 4 Term. R. 82.

<sup>\*</sup> 1 Burr. 38.

visor. Therefore his *general* intent would be best answered by saying, that W. Dymock took an estate tail; and, in so determining, the Court would not go farther than had been done in other cases. Judgment was accordingly given that W. Dymock took an estate tail.

A testator devised all his freehold messuages, &c. to his daughter, Mary Ayscough, and the heirs of her body, lawfully to be begotten, for ever, as tenants in common, and not as joint tenants; and, in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then he gave his freehold messuages to R. Ayscough in fee<sup>p</sup>.

Lord Kenyon said, it was a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of *Robinson v. Robinson*, that where it appeared in a will that the testator had a *general intention*, and also a *secondary intention*, and they clashed, the latter must give way to the former. Here were no words of limitation added to the estate given to the children, (supposing they took as purchasers); and yet the remainder over was not to take effect till there was a general failure of her issue; so that there must be an estate to comprehend all her children for ever; his Lordship concluded in these words—"I admit that in this case the testator intended that his daughter, M. Ayscough should only take an estate for her life, and that her children should take as purchasers: but then he also intended that all the progeny of those children should

Particular intention expressed must give place to the general intention collected from the whole will.

take before any interest should vest in his more remote relations: now the latter intention cannot be carried into effect, unless M. Ayscough takes an estate tail; in order, therefore, to give effect to the devisor's *general intention*, according to the fair construction of the will, M. Ayscough must take an estate tail."

Henry Cook devised a messuage or tenement to Richard Cook *for the term only of his natural life*; and after his decease, he gave and devised the same unto the lawful issue of the said Richard Cook, as tenants in common, to whom he gave, devised, and bequeathed, the same; but in case the said Richard Cook should die without leaving lawful issue, then, and in such case, after his decease, he gave and devised the same to Elizabeth Harding in fee<sup>1</sup>.

Lord Kenyon said, it had been the settled doctrine of Westminster Hall, for the preceding forty or fifty years, that there might be a *general* and a *particular* intent in a will, and that the latter must give way, when the former could not otherwise be carried into effect. That this doctrine had been confirmed by the cases of *Robinson v. Robinson*, *Roe v. Grew*, and *Doe v. Smith*. That the court would best fulfil the *particular* intent of the testator in this case, by giving Richard Cook only an estate for life; but the *general* intent was, that all his issue should inherit the entire estate, before it went over; and *that* intent could only be answered by giving him an estate tail, by implication from the subsequent words, "in default of his leaving issue."

<sup>1</sup> *Doe v. Cooper*, 1 East R. 229.

If an estate be devised to a man for his life with remainders to his first and other sons indefinitely in tail, and then the limitation over is introduced by the words "in default of issue," or "for want of issue of the body of the first taker," or "in default of heirs male" by these words in such a case the express estate for life given to the first taker, shall not be enlarged by construction into an estate tail, for the limitations as they stand extend to all the issue of the first taker. And for this the case of *Bamfield v. Popham*<sup>r</sup>, is the leading and standard authority. But if an estate be given to a man for his life, with limitations to his issue falling short of the testator's manifest intent to embrace all his issue within the scope of the limitations, and then come the words "if he shall die without issue, or in default of issue," these words in such a case will reflect back an estate tail upon the first taker, notwithstanding his express estate for life (2).

Where there is a devise to one for life expressly, with remainders to first and other sons, and then a limitation over in default of issue.

The learned Editor of *Pere Williams* in his note to the case of *Bamfield* and *Popham* very justly observes, that there is no general or fixed rule for the construction of words of this kind, but that courts both of law and equity consider the raising of estates tail by implication always to depend upon the question whether such implication be necessary, or not, to effectuate the *general intention* of the testator.

<sup>r</sup> 1 P. Wms. 54.

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(2) *Langley v. Baldwin*, correctly stated in the case of the *Attorney General v. Sutton*, 1 P. Wms. 753.

That this is the true and proper criterion, appears strikingly from the case of *Langley v. Baldwin*. (3) That was a case referred by the Court of Chancery to the judges of the court of Common Pleas for their opinion, in the time of Lord Trevor. And the limitations run thus. To A. *for his life without impeachment of waste, and with a power of jointuring*, remainder to the first, second, and so on, to the sixth son of A., and no further, in tail male; then came the words, "And if A. shall die without issue male of his body," remainder to B. in fee. And notwithstanding the limitation to A. was without impeachment of waste, and with a power of jointuring, which are usually coupled with a life estate, and therefore in some degree declaratory of an intention in the testator to confine the interest to the life of the first taker, yet the judges of K. B. were unanimously of opinion, that A. took an estate tail by implication; because if there should be a seventh son, and the six sons should die without issue, the property would pass over such seventh son and go to a remote remainder man, which could not be supposed to have been the intention of the testator; therefore, to let in such seventh son and other subsequent sons to take (but still to take as issue male of the body by descent and not by purchase) the court held that A. took, by implication of law, an estate tail.

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(3) In *Ginger v. White*, Willes, 348. The C. J. observed, that this case of *Langley v. Baldwin* was best stated in 1 P. Wms. 759. in the *Attorney General v. Sutton*. And in the case of *Alanson v. Clithero*, 1 Vez. 25. it was observed by Lord Hardwicke, that the case of *Langley v. Baldwin* was wrongly reported in *Equity Cases Abridged* in the very point.

In the case of *Ginger d. White v. White*\*, the devise may be shortly stated thus: the testator John White the elder, being seised in fee of the premises in question, devised to J. for life, and from and after his decease, to the male children of J. successively one after another as they were in priority of age, and to their heirs, and in default of male children of J. then to the female children of J. and their heirs, and in case the said John should die without issue, then he gave the house to his grandson W.; and upon these limitations in the will it was held, that J. took only an estate for life; in pronouncing which opinion it was said by Lord Chief Justice Willes, that to find out what construction is to be put upon the words of a will we ought in the first place to consider what the intent of the testator is, which is too often the last thing that is thought of. And in adverting to the case of *Bamfield v. Popham* he observed, "It has been said, that that case has been held not to be law. I am sure. I have heard it cited, at least twenty times, in the Court of Chancery, and never heard it contradicted; and, I believe, I never shall, except by those persons who know not how to distinguish it (though the distinction is plain and obvious) from some other subsequent cases." The learned Chief Justice then proceeded to point out what those cases were from which it was so distinguishable; and mentioned particularly the case of *Langley v. Baldwin*.

The limitations in *Bamfield* and *Popham* were to the first and other sons indefinitely in tail male, extending to all the issue which might be born of the body of the first taker. Therefore in *Bamfield v.*

\* Willes, 348.

Popham there was no need of construing the express estate for life into an estate tail, since all the issue in tail were already comprehended under the limitations as they stood. And, as was observed in the case of the Attorney General *v. Sutton*<sup>1</sup>, in such a case the words “if he shall die without issue male,” shall be considered as predicated of *such* issue male, and when vainly inserted, and they cannot operate or be of use, they shall not be construed so as to merge and destroy an express estate for life.

The case of the Attorney General *v. Sutton*<sup>2</sup>, was to the same effect, which was shortly this: One seised in fee devised his lands to his nephew for his life, remainder to his first and second sons in tail male successively, (without carrying the limitations further to his other sons,) and after his said nephew's death, *without issue male of his body*, then the remainder over to trustees, for charities; and here the case of *Langley and Baldwin* was relied upon as expressly in point; and the difference was taken between that case and the case of *Bamfield v. Popham*, in which the limitation was to the first and every other son and sons in tail male successively, and so comprehending all the issue male of the first devisee indefinitely. This case passed through several stages of adjudication, but the words “and if he shall die without issue male of his body” were at length adjudged to give an estate tail to the first devisee.

In *Robinson v. Robinson*<sup>3</sup>, the limitation was to *Launcelot Hickes* for his life, and *no longer*, and after his decease, to such son as he should have law-

<sup>1</sup> 1 P. Wms. 753.<sup>2</sup> Ibid.<sup>3</sup> 1 Bur. 38.

fully to be begotten, and *in default of such issue* then to the testator's right heirs ; and these words, *in default of issue*, were held to give the father an estate tail ; for it was plain the testator did not design that his heirs at law should take until his lineal posterity was extinct.

In the Attorney General *v.* Sutton the express limitations went no further than to the second son. In Langley *v.* Baldwin, the estate was expressly carried to the sixth son, and no further. And in the recent case of Wight *v.* Leigh<sup>1</sup>, the words of the will gave only *life-estates* to the sons.

In all these cases the intention of the testator was plain, that the remainder over should not take place until the lineal descendants of the first taker should be exhausted ; to carry which general intention into effect, it was necessary to enlarge the life estate given to the first taker, into an estate tail ; but in Bamfield *v.* Popham the specified limitations carried the estate to all the possible issue of the first taker, in succession.

In the consideration of this point, whether the words be “in default of *issue* male,” or “in default of *heirs* male,” they are of the same force “in a will.”

Issue co-extensive with heirs male, or heirs of the body.

In the case of Doe *v.* Aplin<sup>2</sup>, two of the learned judges observed upon the word “issue,” that it was equal in extent in a will to the words “heirs of the body,” and a saying of Mr. Justice Rainsford<sup>3</sup>, was cited, “that the word ‘issue’ is, *ex vi termini*, nomen

<sup>1</sup> 15 Vez. Jun. 564.

<sup>2</sup> 1 T. R. 82.

<sup>3</sup> Finch, 282. and see the case of King *v.* Melling, 229.



collectivum, and takes in all the issue to the utmost extent of the family, as far as the words 'heirs of the body' would do."

A limitation to one and his heirs, may be reduced by subsequent words to an estate tail.

It is old and settled law that if a man devise an estate to another, in words that primarily import the fee-simple, yet the subsequent words may controul the devise, and reduce the gift to an estate tail. Therefore, if a testator devise lands to A. and his heirs, and afterwards devises the same lands to another, in case A. dies without issue, A.'s estate is reduced to an estate tail; the word 'heirs' being understood in the restricted sense of *heirs of the body*; otherwise, the limitation over could not vest according to the intention of the devisor; for the law does not carry its favour towards wills so far as to suffer the limitation of a fee upon a fee.

Accordingly, in a very early case<sup>b</sup>, where a man devised lands to A., his daughter, and her heirs, and if she died without issue in the life-time of her sister B., that it should remain to B. and her heirs: three judges held this to be an estate tail in A., against the opinion of Dyer, who thought that A. took only a fee-simple conditional; but the resolution of the three judges has been since established by an uniform series of decisions<sup>c</sup>.

In *Brice v. Smith*<sup>d</sup> this rule of construction was

<sup>b</sup> Clatche's case, Dyer, 330.

<sup>c</sup> *Soule v. Gerrard*, Cro. El. 525. *Dutton v. Engram*, Cro. Ja. 427. *Chadock v. Cowley*, Cro. Ja. 695. and particularly the case of *Fitzgerald v. Leslie*, 3 Bro. P. c. 154.

<sup>d</sup> *Wilkes*, 1.

considered applicable to the case, where after a devise by a testator of his freehold messuage to his son P. B. and his heirs for ever, on condition of his paying a sum of money to W. B., the following clause was added, “Item, my will and mind is, that in case any of my said children, unto whom I have bequeathed any of my real estates, shall die without issue, then I give the estate of him so dying, *unto his or their right heirs for ever.*” In this case it was said that though *heirs* would have been construed *heirs of the body*, in case the remainder had been devised over to a stranger, it would be otherwise in the case before the court, because the remainder was devised over to the heirs of the person so dying without issue. But Lord C. J. Willes, who delivered the opinion of the court, said, “that though this distinction had seemed at first to be of some weight, yet, that when considered, it made no difference in reason or law. That even in grants, if there were words that created an estate tail, the grantee would have an estate tail, though the next remainder was limited to his heirs; and nothing was more common in settlements than to limit an estate to a man and the heirs of his body, remainder to his right heirs; and for this plain reason—to prevent his disinheriting his issue, except by some solemn act done in his life-time.” The court were all clearly of opinion that P. B. took an estate tail.

Although there was a charge upon the devisee, in respect of the estate, that circumstance appeared to have no weight in the case last-mentioned, not being adverted to either by the bar or by the bench. But in *Dutton v. Engram*\*, a question of this sort

\* Cro. Ja. 427.

arose. William Goldwell, seised of lands in fee, devised them to his wife for life, and after her death to John his eldest son and to his heirs, upon condition that he, as soon as the land should come to him in possession, should grant to Stephen, his second son and *his heirs*, an annual rent of 4*l.* out of the said tenements, and that if the said John died *without heirs of his body*, that the land should remain to the said Stephen and the heirs of his body.

The first question was, whether John had an estate in fee by the devise, which was to him and his heirs, upon condition that he should grant a rent to Stephen and his heirs, whereby the intent was shewn, as it was said, that he should have a fee, otherwise he could not legally grant such a rent to have continuance after his death. But it was resolved to be an estate tail; for, being limited that if he died *without issue*, then it should go to Stephen, and the heirs of his body, that shewed what heirs of John were intended, viz. *heirs of the body*. But yet, by the limitation of the will, he was to make a grant of the rent, which being by appointment of the donor, was not contra formam donatoris, but stood with the gift, and should bind the issue in tail.

And in a much later case<sup>f</sup>, where J. B. devised to his wife for life, and after her decease to be equally divided among his four children, A., B., C., D., and to each of them and their heirs for ever, share and share alike; and in case they should be minded and agree among themselves to sell the estate, they should have equal shares of the monies from thence aris-

<sup>f</sup> *Roe v. Avis*, 4 T. R. 605.

ing: but if they agreed to keep the estate whole together, then all the rents, issues, and profits thereof, should be equally paid and divided between them and to the several and respective heirs of them on their bodies lawfully begotten, share and share alike; it was held that the children of J. B. took only estates tail in their respective fourths; for though it was given to them and their heirs, *and they had also a power of selling the estate by the former part of the devise*, yet the subsequent words, “to the several and respective heirs of them, on their bodies lawfully begotten,” restrained the operation of the former words, and reduced the estate devised to an estate tail<sup>c</sup>.

Where a man devised lands<sup>b</sup> to A. his son *for ever*, and after his decease remainder to his heir male for ever, with other remainders over, it was holden an estate tail in A.; for, though the first devise being to him for ever, would give him the fee-simple; yet the subsequent words *to his heir male*, shewed what sort of inheritance the devisor intended him (4).

<sup>c</sup> See also to the same effect, *Doe v. Rivers*, 7 T. R. 276. and *Doe v. Whichelo*, 8 T. R. 211.

<sup>b</sup> Roll. Abr. 836.

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(4) The words ‘*for ever*’ in this case, by force of the succeeding words, were rendered inoperative, and then the case was, as if the first limitation had been to A. generally, or for his life, with remainder to his heir male, and in a will is the same as if the remainder had been to the heirs of his body, which, by an ancient rule of law, expounded in *Shelley’s case* 1 Rep. 93. is not an estate in contingency, or in abeyance, awaiting the coming of such heir into existence, and then attaching primarily in him as the root of a

A general explanation of the rule in *Shelley’s case*.

A limitation importing an estate in tail general may by subsequent words be confined to the heirs in tail male.

And what would otherwise be an estate tail general may by subsequent words be confined to the heirs in tail *male*. As if a man devise lands to his wife for her life, and after her decease to her son, and if he dies without issue, *having no son*, that then J. S. shall have it, the son by this devise takes an estate in tail

new succession, but executed in the ancestor, and giving him an immediate estate tail. In the fifth section of Mr. Fearne's contingent remainders, and in the treatise of Mr. Preston exclusively on the subject, the student will find this rule explained in all its varieties of application, and with all the distinctions which negatively mark its boundaries. The lineaments of the rule, (which it would be an idle shew of learning to treat of *at large* in this place, instead of referring the reader to those publications, which have been distinctly devoted to the consideration of it,) are shortly these. An estate for life to A., remainder to his heirs or to the heirs of his body, is not an estate in A. for his life, with a contingent remainder to his heirs or the heirs of his body, but an immediate estate in fee or in tail in A. So, if A. by will or otherwise, has an estate of freehold limited to him, and the same instrument contains a subsequent limitation to his right heirs, or to the heirs of his body, after some other estate for life, or in tail, interposed between such limitation of the first estate to him, and such subsequent limitation to his heirs, or heirs in tail, this remainder to the heir or heirs of the body of A. vests in A. as a remainder, and is transmitted through him by descent as from ancestor to heir. The general rule is this, that whensoever the ancestor takes any estate of freehold, whether it be or be not such as may determine in his life-time, and there is afterwards in the same conveyance, an unconditional limitation to his right heirs, or heirs in tail, (either immediately, and without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of such mean estate), there, such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union

*male*, for though the devise to the son, and if he die without issue, would have been a good tail general, yet when the devisor added the words "having no son," he thereby explained what issue he intended should inherit the land <sup>1</sup>.

<sup>1</sup> Roll. Abr. 837.

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with his particular freehold, one estate of inheritance in possession; but where such limitation is *mediate*, it is then a *remainder* vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates. As, if there be an estate to A. for his life, or during the life of C. or any other sole estate of freehold, remainder to the heirs of the body of A., this is an estate tail executed in possession in A.; but if there be an estate to A. for his life, or during the life of C., or any other estate of freehold, remainder to B. for life, remainder to the heirs of the body of A., this is only a present freehold in A. with a vested *remainder* to him in tail, to take effect in possession after the determination of B.'s estate.

Where the limitation to the heirs, or to the heirs of the body of any ancestor taking the preceding freehold, is contingent, even though the estate so limited could by no possibility have vested in the ancestor, as in the case of a gift to two for their joint lives remainder to the heirs of the one dying first, the heir still takes by descent. But if the contingency on which the vesting is to depend, happen in the life-time of the ancestor, the remainder is then in the class of vested remainders, and as such attaches in the ancestor. So that whether limited on a contingency, or so as that it may immediately vest, it is the ancestor's estate, and the heir can only take by descent.

And where, between the estate of freehold given to A., and the subsequent limitation to his heirs, or heirs of his body, contingent estates are limited to others, though in such a case there is nothing interposed to prevent the immediate union of the limitations to the ancestor and his heirs, yet such union does not operate to merge the freehold in A. necessary to support the intervening contingent limitations; but the two limitations are united and executed in the

Estates may arise in a will by implication merely, and without any express words of devise.

Thus it appears that such is the deference paid by the law to the intention of a testator, that devises regularly passing estates for life may operate to give estates of inheritance, and words giving the fee-simple may be restrained to estates tail, by the implication arising upon subsequent expressions. But

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ancestor, only until such time as the intervening limitations become vested, and then open and become separated, in order to let in such intervening limitations as they arise. Thus in *Lewis Bowle's case*, 11 Rep. 80. where there was a limitation to husband and wife, for their lives, remainder to the first and other sons of the marriage in tail, remainder to the heirs male of the bodies of husband and wife, the court resolved that it was an estate tail executed in the husband and wife sub modo, that is, so as not to merge the estates for life absolutely, but executed only till the birth of the first son : and then the estates should become divided by operation of law, and the husband and wife become tenants for their lives, with remainder to their first and other sons, remainder to husband and wife in tail.

But for this junction of the two estates to take place in the case of husband and wife, the remainder must be the same in quality with the preceding limitation, that is, if the limitation of the freehold be *joint*, the subsequent limitation of the inheritance must be *joint* also, as in the case of *Lewis Bowles* just mentioned. And, if there be a limitation to the wife for her life, remainder to the heir of the body of husband and wife, no remainder is executed in the wife. So, if the limitation of the freehold be not joint but successive, as to one for life, remainder to the other for life, remainder to the heirs of their two bodies, the ultimate limitation is not executed in possession, but the husband and wife take a joint remainder in tail. Though in the case of a limitation to A. for life, remainder to the right heirs of him and B., a stranger, (B. being alive at the time), the ulterior limitation is said to be executed immediately in A. for a moiety, 2 Roll. Abr. 417. pl. 6. and see *Roe v. Quartley*, 1 T. R. 630.

For this rule to apply there must, of course, be an estate in the ancestor ; but it does not signify whether this estate is in him by

there are cases which carry the principle still farther, for an estate tail may sometimes arise by the mere force of implication, without any express words of devise to the party himself, upon the principle of so construing the intention of the testator as to give it a legal effect.

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express limitation, or by implication, or by resultancy, *Pibus v. Mitford*, 1 Vent. 372. But both the estates must be legal, or both equitable for the union to take place. *Venables and Wife v. Morris*, 7 T. R. 342. 438.

And although the limitation to the ancestor be succeeded by a limitation to the heir, or heir male, in the singular number, the rule above-mentioned operates to make this an expansion of the first estate into an estate tail; but if words of limitation are superadded, the person answering the description of heir takes by purchase, and becomes the root of a new inheritance, the stock of a new descent, and the rule in *Shelley's case* has no influence on such a case; still, however, if the first words of limitation are in the plural, words of superadded limitation engrafted upon them will not convert them into words of purchase. In *Archer's case*, 2 Rep. 66. lands were devised to A. for life, remainder to the next heir male of A., and to the heirs male of the body of the next heir male; A.'s estate was adjudged to be only an estate for life, and the remainder to the next heir male to be a good contingent remainder taking effect in him by purchase. But in the great case which gave the name to the rule, the limitation was to the use of the heirs of the body of Edward, lawfully begotten, and of the heirs of the body of such heirs male lawfully begotten, remainder over, in virtue of which limitation Edward took an estate tail.

Nevertheless, if the superadded words limit an estate of a different nature from that which the ancestor would take by virtue of the first limitation to his heirs or heirs male, as if there be a limitation to A. for his life, and after his decease to the use of his heirs, and the heirs female of their bodies; the rule in question seems to be excluded. But for such superadded words of limitation to exclude the rule, they must describe an estate descendible in a different course, and to different persons as special heirs from those to



Thus in the case of *Walter v. Drew*<sup>k</sup>, where a testator having two sons, devised his lands to his second son and his heirs, if his eldest son should happen to die and leave no issue of his body lawfully begotten, it was held that the eldest son took an estate tail by implication, for otherwise the limitation to the second son would have been an executory devise, which, as being limited to take effect upon an indefinite failure of issue of the elder brother, would have been void as being too remote<sup>l</sup>.

Thus also in a case in *Dyer*<sup>m</sup>, a testator having two sons and a daughter, devised his land to the younger son and his heirs, and if both of his two sons should die without issue, remainder to the daughter; the younger son died, and then the testator died, and it was held that the daughter took a good remainder; but to make it such the elder brother was adjudged to take an estate tail by implication of law; for if he had taken no estate, then the limitation to the daughter would have been an executory estate, limited to take effect after the indefinite failure of issue of the elder brother, and consequently void as being too remote.

<sup>k</sup> Com. Rep. 372.

<sup>l</sup> See note *infra*, page 543.

<sup>m</sup> P. 330.

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whom the previous limitation would carry the estate; for if the devise be to A. for life, and after his decease to the heirs of his body begotten, and their heirs for ever, A. clearly takes an estate tail.

For the full discussion and explanation of all these points, the studious reader is referred to the elaborate treatise of Mr. Fearn on Contingent Remainders, particularly the 6th edition, by Mr. Butler, who has added greatly to the value and utility of the original work.

And where a testator devises land to his heir at law, after the death of his wife; here, as the heir at law is plainly excluded during the life of the wife, unless the wife takes it nobody can, and it must be in nubibus till the wife's death. Therefore to avoid this consequence, the wife takes an estate for her life by implication.

In the case of *Willis and Lucas*\*, a testator having two sons, devised his lands to the younger son for his life, he and his heirs paying thereout a rent to the elder brother during his life, and after the death of the younger son, *and also* of his wife, to the first and other sons of the younger son in tail; the younger son died, and the question was whether his wife took any estate; and it was held she took by implication an estate for her life; and the ground upon which it was so held, was the plainly intended exclusion of the heir by the devise of a rent to him during his life.

So in *Goodright v. Goodridge*°, J. G. having two sons, Richard and John, devised all his lands to his wife for life, and then proceeded thus: "And my will is, that if my son Richard do happen to die without heirs, then my son John shall enjoy my lands," and the court held that Richard took an estate tail by implication.

There can be no regular remainder limited after a fee-simple: therefore, where an estate is devised to one and his heirs, and that if he dies without heirs, it shall remain over to another, this last limitation is

After a devise to A. and his heirs, a remainder over, upon A.'s dying without issue, is generally void.

\* 1 P. Wms. 471.

° Willes, 369.

But if such remainder be to a person who might inherit to A., the words 'without heirs' will be construed heirs of the body.

void<sup>p</sup>. Nor can the law help such a devise by any construction for which the will itself does not afford some argumentative support. But where the limitation over is to one who is a collateral heir of the devisee, the testator is construed to mean by the word *heirs*, heirs of the body, and the first devisee takes only an estate tail, for it is not possible that he can die without an heir, while the person to whom the remainder is thus limited, or his issue, continue in existence.

Accordingly, where a testator devised his houses to Francis his son, after the death of his wife; and if his three daughters, or either of them, should survive their mother, and Francis their brother, *and his heirs*, then, that they should enjoy the same houses for the term of their lives, it was resolved that Francis the son had but an estate tail under this will; for by '*heirs*,' in this place, was intended '*heirs of the body*,' because, the limitation being to his sisters, it was necessarily to be intended that it was, if he should die without issue of his body, for they were his heirs collateral; and the intention being collected by the will, the law should adjudge accordingly<sup>q</sup>.

The construction is the same where the remainder is limited to the heirs of the testator himself.

And the same construction prevails where the remainder is limited to the heirs of the testator himself; if such heirs must also be heirs of the first devisee. Thus in *Nottingham v. Jennings*<sup>r</sup>, where a person, having issue three sons, John, Francis, and William,

<sup>p</sup> Co. Litt. 18. a. Vaughan, 269.

<sup>q</sup> Webb v. Hearing, Cro. Ja. 415. and see Tyte v. Willis, Ca. Temp. Talb. 1. Morgan v. Griffiths, Cowp. 234.

<sup>r</sup> Com. Rep. 82.

devised his land to Francis and his heirs, and for default of heirs of Francis, to the heirs of the devisor, it was said by Holt C. J. that as the testator had devised that his own right heir should take after the death of Francis without heirs, although his own right heir took nothing by the devise, (for he took by descent), yet that circumstance shewed the testator's intention to have been, that upon the death of Francis *without issue*, the eldest son should take, and that, therefore, the word *heirs* must be construed to mean *issue*, because Francis could not die without an heir as long as the testator had an heir.

But where the devise was to one and his *heirs*, and if he died *without heirs*, then to a charity; this devise over was held to be void\*. And again, where the testator devised to his son and his *heirs*, and if he should die *without heirs*, remainder over to another who was half brother to the first devisee: upon a question made, whether the first limitation was in fee or in tail, Lord Hardwicke said it was a plain case, and one of those points which the court would not suffer to be argued, as having been determined before (5): for

\* Attorney General v. Gill, 2 P. Wms. 369.

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(5) It would be in contradiction to the nature of a remainder, to be limited after a fee; for Lord Coke defines a remainder to be “a remnant of an estate in lands or tenements, expectant upon a particular estate, created together with the same at one time;” and this is the nature of a remainder, whether vested or contingent; it is that which remains of the fee after a particular estate has been carved out of it. At common law there were two sorts of particular estates—an estate for years, and an estate for life; but by the statute de donis another sort of particular estate, the estate tail, was introduced, leaving a reversion, or remnant of

Of the properties of a remainder vested, and contingent.

this was a devise over to a stranger, as the law considered him, and who would not in any event inherit as heir to his brother<sup>1</sup>.

Of the im-  
plication  
of cross re-  
mainders.

Cross remainders, or reciprocal expectancies, in succession, between several persons, to and amongst whom an inheritance in land is originally devised, are also interests which may arise in a will without ex-

<sup>1</sup> *Tilbury v. Barbut*, 3 Atk. 617.

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the fee in the donor, which is always to be distinguished from a possibility of reverter, and a right of entry for a condition broken.

To satisfy the above definition of a remainder, it follows that one or other of these descriptions of a particular estate, must first be carved out of the fee. If land be conveyed or devised to A. for his life, and after A.'s decease to B. and his heirs, the estate vests in interest, though not in possession, and is a proper vested remainder in B. And this answers Lord Coke's definition, for B.'s remainder passes from the grantor at the same time as A.'s life estate in possession. Again, if land be conveyed or devised to A. for life, and if B. die in the life-time of A., then after B.'s decease to C. and his heirs, C.'s estate is contingent.

To be a proper remainder, it must exist in lands and tenements, and not chattel interests, which are not the proper subjects of remainders in law. And to be a good *contingent* remainder, it is a rule that some vested estate of freehold must precede it; which rule arises from the necessity there is for the freehold to pass out of the grantor at the time that the remainder is created. If I limit an estate to the use of A. until C. return from Rome, and after the return of C., to the use of B. and his heirs; A., in this case, has a particular estate which is to last till C.'s return, which being an uncertain period, such particular estate in A. is a freehold, for it *may* last for his life, and the residue of the estate after C.'s return, is a remnant of the fee expectant upon the particular estate; but as C.'s return from Rome is an uncertain event, the limitation of such remnant over being dependent thereupon, is a contingent remainder.

press limitation, by force of the implied intention of the testator ; though it is a settled rule that they can only be created in a deed by express limitations\*. The formal limitation, which it is safest to adopt both in wills and deeds, runs as follows :—“ To the use of all and every the sons or daughters, &c. (as the case may

\* *Cole v. Livingston*, 1 Ventr. 224. *Doe v. Dorvell*, 5 T.R. 521.

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Mr. Fearne has distinguished contingent remainders into four sorts :—

First, where the remainder depends entirely on a contingent determination of the preceding estate itself ; as if A. make a feoffment to the use of B. till C. return from Rome, and after such return of C., then to remain over in fee, here the particular estate is limited to determine on the return of C., and only on that determination of it is the remainder to take effect ; but that is an event which possibly may never happen, and therefore the remainder, which depends entirely upon the determination of the preceding estate, is dubious and contingent.

Secondly, where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder ; as if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life. So if lands be given to A. in tail, and if B. come to Westminster-hall such a day, to B. in fee ; here B.'s coming to Westminster-hall has no connection with the determination of A.'s estate ; but as it is an uncertain event, and the remainder to B. is not to take place unless it should happen, such remainder is therefore a contingent remainder.

Thirdly, where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate ; (and it is necessary that some preceding freehold estate should subsist and endure till the contingency happens, though a remainder may be so limited as not to vest till the very instant at which the preceding estate determines :) as if a lease be made to J. S. for life, and after the death of J. D. the lands to remain to

be) and of the heirs of their respective bodies issuing, share and share alike; as tenants in common; and in case there shall be a failure of issue of the body or bodies of any of such sons or daughters, then as to the part or parts, as well accruing and surviving, as original, of such of them whose issue shall so fail, to the

another in fee; now it is certain that J. D. must die some time or other, but his death may not happen till after the determination of the particular estate by the death of J. S., and therefore such remainder is contingent. So in case of a lease for life to A., and after the death of A. and M., the remainder to B. in fee, this is a contingent remainder; for the particular estate being only for the life of A., and the remainder not to commence till after the death of A. and M., if A. die before M., the particular estate will end before the remainder can commence, which is very possible, and therefore such remainder is contingent.

Fourthly, where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of J. S.; now there can be no such person as the right heir of J. S. until the death of J. S. (for *nemo est hæres viventis*) which may not happen till after the determination of the particular estate by the death of tenant for life, therefore such remainder is contingent.—So where a remainder is limited to the first son of B. who has no son then born; B. may never have a son, or if he should, the particular estate may determine before the birth of such son; therefore this remainder is contingent.—So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent; for it is uncertain who will be the survivor.

Cases wherein the limitation is void as being mounted on a fee.

With respect to the doctrine adverted to in the text,—that a fee cannot be mounted on a fee; it may be useful in a short compass to shew wherein limitations over may be invalid on this ground of objection; as,

1. When there is a limitation to A. and his heirs, (which is a pure fee-simple) remainder to another who cannot possibly be heir to A., and his heirs, the limitation over is void.

2. When there is a limitation to A. and his heirs, as long as A. and his heirs shall be lords of the manor of D., or while B. or any

use of the survivors or survivor, and other or others of them, equally to be divided between them if more than one, share and share alike, as tenants in common, and to the several and respective heirs of the body and bodies of such surviving and other son or sons, daughter and daughters; and if all such sons

issue of his body shall be in existence, and when A. or his heirs shall cease to be lords of the manor of D., or after the decease of B. and failure of his issue, then to C. and his heirs; in either of these cases the remainder to C. is void.

But where an estate is limited after a limitation of the fee, but not so as to await its natural expiration by efflux of time, but so as to happen within a certain period, and then to take place in exclusion of the first estate; this ulterior disposition of property, though void at common law, is valid under the form and character of limitations to uses or executory devises, provided it be limited to take effect within a certain distance of time allowed and prescribed by the rules, in that respect, which have been settled by a series of cases and authorities.

Of the nature and restrictions of executory devises.

What these rules are has been so clearly and concisely shewn by the late Mr. Serjeant Williams in his note to the case of *Purefoy v. Rogers*, 2 Saund. 388. that it is conceived a full extract from it will be the best mode of completing the object of this note, i. e. of placing before the reader a very short, but faithful outline of this difficult doctrine.

“One of the properties of executory devises is, that they cannot be aliened or barred by any mode of conveyance, whether by recovery, fine, or otherwise; therefore until the contingency happens upon which the limitation is to take place, executory devises create a kind of perpetuity; for which reason the law has put them under some restraint, and circumscribed the bounds within which they are to be allowed.

“At first it was held that the contingency must happen within the compass of a life, or lives in being, or a reasonable number of years after; at length it was extended a little further, namely, to a child in ventre sa mere at the time of his father's death, because, as that contingency must necessarily happen within the usual time of ges-



or daughters shall die without issue, or there shall be but one such son or daughter, then to the use of such one son, or daughter, and the heirs of his or her body." This formal language, however, is not indispensable in a deed, and so long as the limitations are described substantially, and in terms, it matters not,

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tation, that construction would introduce no inconvenience: and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetuity. *Goodtitle v. Wood*, Willes Rep. 213. Therefore it is now become an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation. *Long v. Blackall*, 7 Term Rep. 102. This rule was adopted in analogy to legal formal limitations, namely, for a life or lives in being with a remainder in tail to unborn children, who cannot bar it till twenty-one, and the fraction of another year, since the statute of William, if tenant for life should leave his wife ensient. *Porter v. Bradley*, 3 Term Rep. 146." The Serjeant then states an example of what he calls the proper executory devise, which is where an estate in fee is devised, followed by a limitation of the inheritance over to another upon the happening of a particular event, and thus proceeds:

"2. There is another species of executory devises, where a testator gives a future estate to arise upon a contingency, or at a certain time, and does not part with the fee, but retains it; and on his death the fee descends to his heir in the mean time. 1 Salk. 229, 230. As where a man devised to his wife till his son attained the age of twenty-one, and then that his son should have the lands to him and his heirs; but if he died without issue before his said age, then to his daughter and her heirs, this was adjudged to be a good executory devise to the daughter, if the contingency happened, and that in the mean time the fee descended to the son as heir; but if he lived to twenty-one, though he died after without issue; or if he left issue, though he died before twenty-one, the daughter could not have the lands, because her brother was to die before twenty-one, and without issue to intitle her to take. 3 Leon. 64. 70.

though the terms are informal, and to a certain degree incorrect".

In a will, cross remainders may be implied, without any express limitations, where there is evidence furnished by the tenor of the instrument, to shew that

Changes in respect to the rule of presumption.

" Doe v. Wainewright, 5 T. R. 427.

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*Hinde v. Lyon.* 2 Roll. Rep. 197. 217. *Boulton's case.* Palm. 132. S. C. 1 Eq. Cas. Abr. 188. So where a testator devises lands to A. in fee to commence six months after his decease, it is a good executory devise, and during those six months the estate descends and continues in the testator's heir at law. 1 Lutw. 798. *Clarke v. Smith,* S. C. cited 2 P. Will. 43. So where a man seised in fee devised to trustees for 500 years upon certain trusts, remainder to the first and other sons of his eldest son T., who was then a bachelor, successively in tail-male, remainder over; the limitation to the unborn son of T., was held good by way of executory devise; and it was also held that the inheritance descended to T. till he had a son, or till his death without one. *Gore v. Gore,* 2 P. Will. 28. In this case it is to be observed, that the contingency, upon which the executory devise is limited to the first son of T., must in all events happen on the death of T., for it must take place either on the birth of a son to T., or on his death without having had any son. A man having only one sister and heir, who had issue A., and afterwards married W., by whom she had issue B. and M., devised lands to his sister until B. should attain twenty-one, and after B. should have attained that age to B. and his heirs; and if B. should die before twenty-one, then to the heirs of the body of W. and their heirs, as they should attain their respective ages of twenty-one. The testator died; B. died before twenty-one, living W., and afterwards W. died. It was adjudged that T. M. either as heir of B., or as heir of the body of W., being of age after the death of W., took the estate by way of executory devise. *Taylor v. Biddall,* 2 Mod. 289. There M. who was the heir of the body of W. could not take till the death of W., because *nemo est hæres viventis*; and as that heir of the body of W. who should attain twenty-one might

it was the testator's intention that the estate should go in that course of succession. But it has been said that the law never favours cross remainders even between two persons only, and that between more than that number, they could not, under any circumstances, be implied\*, on account of the confusion that would

\* 2 Roll. Rep. 282. *Gilbert v. Whitty*, Cro. Ja. 655. *Davenport v. Oldis*, 1 Atk. 579, 580. per Lord Hardwicke.

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not have been born before his father's death, and the estate could not vest in him till his age of twenty-one, it is evident the estate might possibly not have vested under that limitation till twenty-one years after a period of a life then in being. So where a testator devised lands unto his grandson W. S. and his heirs; but in case W. S. should die before he should attain his age of twenty-one years, then to his grandson T. S., and if T. S. should die before he should attain his age of twenty-one years, then to such other son of the body of his daughter M. S. by his son in law T. S., as should happen to attain his age of twenty-one years in fee, and for default of such issue remainder over. The testator died leaving two grandsons, the said W. S. and T. S. who both died under age; afterwards another son A. of the body of M. S. by T. S. was born; it was held by the judges of the court of K. B. upon a case sent to them, and afterwards decreed by Lord Talbot, that it was a good executory devise to this after-born son A., if he should attain his age of twenty-one years: and the judges decided it upon the authority of the last mentioned case of *Taylor v. Biddall*; the record of which was searched and found to agree in the material parts of it with the printed report. *Stephens v. Stephens*, Cas. Temp. Talb. 238. In this case the limitation was confined to vest at the infant's age of twenty-one, which must necessarily happen within twenty-one years after the death of its mother M. S. who was then in being. So where a devise was to the child with which the testator's wife was then ensient, in case it should be a son, during his life, and after his decease then to such issue male, or the descendants of such issue male, of such child, as, at the time of his death, should be his heir at law; and in case, at the time of the death of such

be likely to arise from the division of the estate among so many; and the uncertainty as to what interest would vest in the survivors\*. But this exclusive doctrine has received considerable qualification, and the following distinction has since prevailed, viz. : " That the presumption is in favour of cross remainders be-

\* *Holmes v. Meynel*, Sir Thos. Jones, 173.

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child, there should be no such issue male, nor any descendants of such issue male then living, or in case such child should not be a son, then to P. L. ; it was held that it was a good executory devise over to P. L. within the limits allowed by law with respect to executory devises ; for the devise over to P. L. must take effect, if at all, after a life which must be in being within nine months after the testator's death. *Long v. Blackall*, 7 Term Rep. 100. ' This case, it is to be observed, begun with a devise to a posthumous child for life, with a limitation over, upon a failure of issue of his body at his death ; which of course would include an heir male then in ventre sa mere ; for as the devise begun with the allowance for the birth of a posthumous child, and also might conclude with it, the time might be claimed twice over ; and so the time allowed for the birth of a posthumous child after lives in being and twenty-one years might be enlarged to two periods of gestation. And therefore in a late case, it was objected in argument, either that the effect of beginning an executory devise with the life of a person in the womb had escaped the attention of the Court of King's Bench ; or if that court did take it into their consideration, and meant to say that the executory devise was nevertheless a valid one, then it was insisted, that the opinion of the judges in that case was questionable, as having exceeded former determinations, because it added a further period to the boundary of executory devises, and the decision had the effect of taking the life of a person en ventre sa mere for a life in being ; but that objection was over-ruled, and the case of *Long v. Blackall* was allowed and approved of as a case of undoubted law, 4 Vez. Jun. 254. 273. 323. 341.

" It has been held, in support of a testator's intent, that a limitation in a will which, in one event, would have operated as a contin-

tween *two* and no more; but where the question arises, whether cross remainders, are to be implied between *more than two*, they are rather to be presumed *against*, although such presumption against them may be answered by circumstances plainly indicating a general intention which cannot be sa-

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gent remainder, but which event did not happen, should operate as an executory devise, provided it falls within the established rule of law respecting executory devises. As where a devise was to S. son of J. for life, remainder to his first and other sons in tail-male, remainder to any other son or sons of the said J. who had no other son then born, remainder over. S. died in the life-time of the testator without issue, and afterwards the testator died; it was held by Lord Talbot that on the event which happened, namely, S.'s death in the testator's life-time, it would best effectuate the testator's intent to construe the limitation over to the first and other sons of J., to be an executory devise, though if S. had survived the testator, they would have operated as contingent remainders. Cas. Temp. Talb. 44. Hopkins v. Hopkins. See *Brownsword v. Edwards*. 2 Vez. 249. S. P.

“With regard to executory devises it is a rule, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. However it seems to be established, that whenever the first limitation vests in *possession*, those that follow vest in *interest* at the same time, and cease to be executory, and become mere vested remainders and subject to all the incidents of remainders, as appears by the before-mentioned cases of *Stephens v. Stephens*, and *Hopkins v. Hopkins*, and also *Doe v. Fonnerau*, Dougl. 487.

“3. A third sort of executory devises or rather *bequests* is, where a term *for years* or other *personal estate* is bequeathed to one for life, remainder over to another; the remainder shall take effect as an executory bequest. At common law, if a man had granted by deed a term of years to A. for life, remainder over to B., A. had the whole term in him; and therefore no remainder could be limited after it. But when long and beneficial terms came in use, the convenience of families required that they might be settled upon a child, after the death of the parent. Such limitations were soon

tified but by the construction of cross remainders." And this seems to be nothing more than a return to good sense and ancient law; for in *Clache's case*<sup>7</sup>, 13 Eliz. where a man having issue *five* sons, devised lands to his four younger sons and the heirs male of their bodies; and if they all died without issue of their bodies, or any of their bodies, that the

<sup>7</sup> Dyer 303. b.

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allowed to be created *by will*; and the old objections were removed by changing the name from *remainders* to *executory bequests*.

"It is an established principle that the limitation over of a term after a general failure of issue is void, as being too remote. *Saltern v. Saltern*, 2 Atk. 312. 376. If however the testator makes use of words in his will which indicate an intention to confine the generality of the expression of *dying without issue*, to dying without issue *living at the time of the person's decease*, they will be so construed to effectuate the intent. As where a term was bequeathed to H. for life, and no longer, and after his decease to such of the issue of the said H. as *H. should by will appoint*, and in case H. should die without issue then over to A.; H. died without issue living at his death; those words upon the whole of the will were construed to mean issue living at his death; because it was to be intended such issue as A. should or might appoint the term to, namely, issue *then living*. *Target v. Gaunt*, 1 P. Wms. 432. So where a testator gave the residue of his real and personal estate to his nephews W. and G., and if either of them should depart this life, and *leave no issue* of their respective bodies, then he gave the said premises to D., Lord Chancellor Parker observed that the devise carried a freehold as well as a leasehold; nevertheless, he thought it might be reasonable enough to take the same word in two different senses as to the two different estates; and that as to the freehold, the construction should be, if W. or G. died without issue *generally*, and as to the leasehold, the same words might be construed to mean a dying without *leaving* issue *at their death*. *Forth v. Chapman*, 1 P. Wms. 667. Thus also, where a term was bequeathed to T. son of D. and S. and the heirs lawful of him for ever; but in

lands should remain to his right heirs, it was held that no part should revert as long as any of his sons had issue male.

The more modern cases have confirmed the doctrine of the case in *Dyer*, and whether cross remainders

case he should happen to die and *leave no lawful heir*, then and in that case the testator gave the premises after the death of the said T. to the next eldest son or heir of the said D. and S. T. died without issue. The court were clearly of opinion on the authority of the last cited case of *Forth v. Chapman*, which had been uniformly followed by a series of cases down to that time, that the limitation over was good; for it was equivalent to leaving no issue at the time of his death. 2 Term Rep. 720. *Goodtitle v. Pegden*. See also 1 P. Wms. 198. *Nichols v. Hooper*. Ibid. 563. *Pinbury v. Elkin*. Ibid. 534. *Hughes v. Sayer*. Ibid. 748. *Pleydell v. Pleydell*, 2 P. Wms. 421. *Maddox v. Staines*, 3 P. Wms. 258. *Atkinson v. Hutchinson*, Cowp. 410, 411. *Denn v. Geering* per Lord Mansfield.—But though in these last cited cases it was held, that the words, ‘if the legatee shall die without issue,’ then over, in bequests of personal property, *ex vi termini*, and of themselves, signified a dying without issue *living at the death* of the first taker; yet the more modern cases agree that they are not to be so understood, but on the contrary they shall be intended to mean an *indefinite failure of issue*, unless the contrary appear from other circumstances in the will. 2 Atk. 313, 314. *Beauclerk v. Dormer*, Ibid. 376. *Saltern v. Saltern*, 2 Vez. 181. *Earl of Stafford v. Buckley*, 1 Bro. C. C. 190. *Begge v. Bensley*. 5 Vez. Jun. 440. *Rawlins v. Goldfrap*.”

[The distinction taken in *Forth v. Chapman* between real and personal estate, was doubted, if not denied, by Lord Kenyon, in *Porter v. Bradley*, 3 T. R. 146. who considered the words, *leaving issue*, as having a confined relation to the time of the death of the parent, in the cases both of real and personal estate: but the great authority of Lord Eldon in *Croke v. De Vandes*, is decidedly in favour of the distinction taken in *Forth v. Chapman*.]

“It seems now to be established, notwithstanding some old opinions to the contrary, that contingent and executory estates and possibilities, accompanied with an interest, are descendible to the

are to be inferred where the question regards more than two persons, seems now to depend upon the same general principle of effectuating the testator's intention, as in all other questions of construction upon wills.

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heir, or transmissible to the representative of a person dying, or may be granted, assigned or devised by him, before the contingency, upon which they depend, takes effect. *Willes's Rep.* 211. *Goodtitle v. Wood*, 2 *Burr.* 1131. *Selwin v. Selwin*, S. C. 1 *Black. Rep.* 251. 2 *Wils.* 29. *Goodright v. Searle*, 1 *Black. Rep.* 605. *Roe v. Griffiths*. *Moor v. Hawkins* before Lord Northington, cited in 1 *H. Black.* 30. *Roe v. Jones*, and 3 *Term Rep.* 88. Where *Roe v. Jones* was affirmed in *K. B.* on error. *Cas. Temp. Talb.* 117. *King v. Withers*.

“It is enacted by statute 39 and 40 Geo. 3. c. 98. that no person shall by any deed, surrender, will, codicil, or otherwise, settle or dispose of any real or personal property, so that the rents, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life of such grantor or settler, or the term of twenty-one years from the death of such grantor, settler, deviser, or testator, or during the minority of any person who shall be living, or in ventre sa mere, at the time of the death of such grantor, deviser, or testator, or during the minority only of any person who, under the trusts of the deed, surrender, will, or other assurance directing such accumulation, would for the time being, if of full age, be intitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of that act, go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed. Provided that the act shall not extend to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of timber.”

To this useful extract may be properly subjoined the rule which



A person devised land to his four sisters and a niece for their lives, share and share alike, as tenants in common and not as joint-tenants, remainder to their sons successively in tail male, remainder to their daughters in tail, the reversion to his own right heirs\*.

Lord Mansfield said, that wherever cross remainders were to be raised by implications between two, and no more, the presumption was in favour of cross remainders; where they were to be raised between more than two, there the presumption was against cross remainders; but that this presumption might be answered by circumstances of plain and manifest intention either way. This was a qualification of the rule laid down in former cases; for they seemed to say that there should not be cross remainders between more than two; but the true rule was to take it with the qualification above stated. Here the presumption was against cross remainders, and judgment was given that there were no cross remainders.

A devise was in these words:—"To the use of all and every the daughter and daughters of the body of P. H., and to the heirs of her and their body and

\* Perry v. White, Cowp. 777.

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was laid down by Lord Hale in the above-mentioned case of *Purefoy v. Rogers*, namely, "that where a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only." A rule which Lord Kenyon in delivering the opinion of the court in *Doe v. Morgan*, 3 T. R. 363. stated to have uniformly prevailed without any exception to the contrary.

bodies lawfully issuing ; such daughters, if more than one, to take as tenants in common, and not as joint-tenants ; and for default of such issue, to the right heirs of the devisor for ever." There were two daughters, and one of them having died an infant, the question was whether her sister became entitled to her moiety. A case being sent out of the court of Chancery for the opinion of the Judges of the King's Bench, the certificate was :—" There are no words in the instrument which intimate any intention to limit over the *respective* shares of the two daughters dying without heirs of their bodies respectively : on the contrary, the limitation over is of the *whole* estate, limited to all the daughters, and is to take place on the express contingency of failure of all and every the daughter and daughters, and the heirs of their body and bodies ; and the limitation over on default of such issue is to the heir at law. Consequently we are of opinion, that as nothing is given to the heir at law, whilst any of the daughters or their issues continue, they must amongst themselves take cross remainders\*."

George Phipard devised all his lands, situate, &c. to his brothers William and John, and his sister Elizabeth, and the heirs of their bodies, as tenants in common, and not as joint-tenants ; and for want of such issue, to his own right heirs for ever ; and gave all the residue of his goods and chattels, as well real as personal, to his said brothers and sister, to be equally divided between them. Upon a case out of Chancery, Lord Mansfield said, that the reason given in the old cases against raising cross remain-

\* *Wright v. Holford*, Cowp. 31. reported by the name of *Wright v. Englefield*, Ambl. 468.

ders, to prevent the splitting of freeholds, had not very great weight at the time it was given, and certainly had none now. To be sure where they were to be raised between two, and no more, the favourable presumption was in support of cross remainders; where between more than two, the presumption was against them; but the intention of the testator might defeat the presumption in either case.

In general, he believed, in devises of this kind, the intention of the testator was in favour of cross remainders. But there must be some circumstances manifesting such intention. In the present case, the testator had two brothers and a sister; if he meant his estate should have gone to his heir at law, there was no occasion to make a will; therefore, it was clear he did not mean his brother John should take as heir, or that William should do so. But he meant that his sister should be equally an object of his bounty. It was clear that he meant no division should take place to create an inequality between them till a failure of the heirs of *all* their bodies. He therefore began with the disposition thus: "As to *all* my temporal estate, I give *all* my lands to my two brothers and my sister, and to the heirs of their bodies lawfully begotten."

These were the words of an ignorant man, and the will was inaccurately drawn; for there could not be a limitation to two brothers and a sister, and to the heirs of their three bodies. The court, therefore, must mould them as near to the intent of the testator as they could. The lands, he said, were equally to be enjoyed by his brothers and sister, and the heirs of their bodies. It was impossible to have expressed

his intention, that his sister should take equally with his brothers, more plainly. He meant his estate should continue fettered with an intail, during the existence of the persons then in being, and their issue ; and that his heir at law should take nothing till after that intail was determined : whereas, if the construction were to be, that the heir at law should take upon the failure of issue of any one, the elder or the younger brother, as the case might happen, would then take a fee in the share of the deceased brother or sister, and so create an inequality, which the testator never intended to make : for it was limited to them, and the heirs of their bodies, and for want of such issue : want of issue there plainly meant issue of all of them. How could it then be executed, but by raising cross remainders ? It seemed to be as strong a case as that of *Wright v. Holford*. The other judges concurred, and the court certified that these were cross remainders<sup>b</sup>.

T. B. being seised in fee, devised all his manors, &c. to all and every the daughter and daughters of the body of his daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants ; and for default of such issue, he gave and devised *all his said premises* unto his right heirs for ever. Upon a case sent out of Chancery for the opinion of the judges of the King's Bench, Lord Kenyon said, that as between two only, it should be presumed that cross remainders were intended to be raised ; but if there were more than two, it was necessary to resort

<sup>b</sup> *Phipard v. Mansfield*, Cowp. 797.

to other words in the will to discover an intention to raise cross-remainders : but, here, there was no doubt, from the words of the limitation over, but that the devisor intended to raise cross remainders between the grand-daughters. The testator clearly intended that the whole should go together ; whereas, if no cross remainders were raised between the grand-daughters, it would go to the right heirs by separate portions on the death of each grand-daughter<sup>c</sup>.

Mr. Justice Buller said this was a stronger case for raising cross remainders than that of *Phipard v. Mansfield* ; for here, besides the words, ‘ for default of such issue,’ namely, issue of all of them, the devise over is of *all* the devisor’s estates. Now, they could not all go together, but by making cross remainders between the grand-daughters.

The court certified, that the daughters of Martha took estates in tail male, with cross remainders.

A person devised an estate to all and every the younger children of Mary Foxon, begotten or to be begotten, if more than one, equally to be divided among them, and to the heirs of their respective body and bodies, to hold as tenants in common, and not as joint tenants. And if the said Mary Foxon should have only one child, then to such only child, and to the heirs of his or her body lawfully issuing ; and for want of such issue, he gave and devised the said premises to C. N. The question was, ‘ whether cross remainders were raised between the younger children of Mary Foxon<sup>d</sup>.

<sup>c</sup> *Atherton v. Pye*, 4 Term. Rep. 710.

<sup>d</sup> *Watson v. Foxon*, 2 East. R. 36.

Lord Kenyon said, that where cross remainders were to be raised by implication between two, and no more, the presumption was in favour of cross remainders: where they were to be raised between more than two, the presumption was against them; but that presumption might be answered by circumstances of plain and manifest intention either way. Whatever was declaratory of the intention of the party, he took to be expressed. No technical words were necessary to convey an intention; but, if taking the whole instrument together, there was no doubt of the party's meaning, the court arrived at the conclusion. Now, here the testator set out with devising *all* his farm, &c. to his daughter and granddaughter for their lives, remainder, after the death of the survivor, to all and every the younger children of Mary Foxon, if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies as tenants in common: and, if only one child, then to such only child, and the heirs of his or her body, &c.; and for want of such issue he gave and devised the said premises to his son-in-law, C. N. (what he meant by the *said* premises was evident, and could not have been rendered clearer by saying, *all* the said premises, though it might have served to multiply words.) Then, after several limitations, and for want of such issue, he proceeds to divide the estate into thirds, to go to different persons: till then the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress was laid here upon the word *respective*, as disjoining the title; and the authority of Lord Hardwicke was referred to in the cases mentioned. No person regarded whatever fell from that great Judge, with more reverence than he did; but it was unworthy of his

great learning and ability, to lay such stress as he was stated to have done, on the word 'respective.' Creating a tenancy in common, divided the title as much, whether the word 'respective' was used or not. And, as to what might have been said by other Judges, with reference to the opinion delivered in *Comber v. Hill*\*, and *Davenport v. Oldis*, in subsequent cases where the word 'respective' did not occur; feeling themselves right on the principle on which they proceeded, it was not to be wondered at, that they were desirous of relieving their own minds from the weight of Lord Hardwicke's opinion: but it was too much to infer from thence that those Judges, therefore, approved of his opinion, or that their judgments were governed solely by that consideration. In the case of *Atherton v. Pye*, the devise over, in default of such issue, was of *all* the testator's said lands: and stress was laid by some of the Judges on the word *all*, in support of raising cross remainders between the issue, he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word 'all' was not decisive of that case, and, in truth, made no difference in the sense; for a devise over of *the said premises*, or *the premises*, or *all the said premises*, meant exactly the same thing. Admitting, therefore, the general rule, that the presumption was not in favour of raising cross remainders by implication between more than two, still that was upon the supposition, that nothing appears to the contrary, from the apparent intention of the testator. He had no doubt here, but that the testator intended to give cross remainders among the issue of M. F. The devise over of the *premises* meant *all the premises*. He intended that *all*

the estate should go over at the same time. He thought Lord Mansfield's quarrel with *Davenport v. Oldis* well founded; and he agreed with the cases of *Wright v. Holford*, and *Phipard v. Mansfield*; and he could not distinguish this case from those. He was clearly of opinion, that the intention of the testator was the polar star, by which the court should be guided in the construction of wills, where no law was infringed, &c. Here the intention was clear to give cross remainders. The other Judges concurred; and judgment was given accordingly.

Thus it appears, therefore, that by a series of weighty decisions, the severe doctrine of opposing the implication of cross remainders between more than two, has entirely given way to the principle of consulting the testator's intention, without regard to technical phrascology. If the object of the testator by the limitation over, after the devise to the persons before-named to take as tenants in common in tail, appears to be to limit the estate entire and unbroken to those in remainder, and not till after the failure of all the issues of the persons so previously entitled as tenants in common, to effectuate that intent cross remainders will be implied among such tenants in common. And very slight verbal particularities have been considered as marks of such intention. Thus in *Roe v. Clayton*<sup>f</sup>, it seemed to weigh much with the court that the limitation over was a devise of *all* the estate. And in the subsequent case of *Doe d. Gorges v. Webb*<sup>g</sup>, where the testatrix devised the premises to her daughters as tenants in common, and the heirs of their bodies, and in default of such issue, gave the *same* to her own right heirs for ever; the word

The doctrine of opposing the implication of cross remainders between more than two, has given way to the principle of consulting the testator's intention.

<sup>f</sup> 6 East, 628.

<sup>g</sup> 1 Taunt. 234.



'same' was considered as shewing that the testator meant to give all together to the devisee over.

In a very late case in Chancery<sup>1</sup>, however, Lord Eldon did not seem to think the reasoning from these expressions, '*all*,' or '*all the premises*,' or '*the same*,' very satisfactory. But his Lordship fully adopted the opinions of the Judges in the later cases, as to the improper stress laid by Lord Hardwicke, in *Davenport v. Oldis*<sup>1</sup>, on the purport of the words *several and respective* in the devise to the persons and their issues in tail; since the words "to take as tenants in common," do equally without these words import estates in severalty; and the estates of tenants in common do, as such, without more words, descend to their issues respectively.

Upon the whole it may be doubted whether, consistently with the spirit of the modern cases upon this subject, which evidently shew a strong disposition to take cases out of the influence of the supposed rule of presumption against the implication of cross remainders between more than two, such distinction between the cases grounded on the difference of number has in reality any longer a practical existence; for it will be difficult to understand the proposition that the courts lean one way, and the presumption of law another. And it must be difficult, if not impossible, to apply this supposed difference of presumption to those numerous cases where the devise is not to individuals named and ascertained, but to the fu-

<sup>1</sup> *Green v. Stephens*, 17 Vez. Jun. 64.

<sup>1</sup> 1 Atk. 579. 580. See also *Comber v. Hill*, 2 Strange, 969. and *Williams v. Browne*, 996.

ture children of persons having none at the time of the devise ; for if these presumptions are to be considered as founded upon the intention of the testator, such intention in the case last supposed must be inferred as provisionally and in prospect contemplating the possible alternative of the objects of the devise being two and no more, or above that number, and calling for a different construction as the event may shape the case.

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## SECTION VI.

*By what words an Estate for life only will pass.*

IT seems to be a safe and fundamental principle in the construction of wills, that it shall be made according to the rules of the common law in respect to estates limited or conveyed by deeds, unless there is something clearly to be collected from the will itself disclosing a different intention in the testator (1). And it will be useful as a check upon the zeal sometimes discovered for executing the supposed intention of a testator, to remember Lord Chancellor Harcourt's

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(1) Carth. 5. per Bridgman, C. J. who cites Wild's case, 6 Rep. 16. in support of the position.

observation in *Bale v. Coleman*<sup>a</sup>, that “the intent which ought to govern must be a certain and manifest intent, and not an arbitrary one; it must be according as it appears upon the will, and according to the known rules of law;—it is not to be left to a latitude, and as it may be guessed at.” (2)

<sup>a</sup> See *Vin. Abr. tit. Dev. (D. b.) 7 MSS. Rep.*

General  
rules for  
the con-  
struction of  
wills.

(2) The following general rules respecting the construction of wills seem to be pretty steady in their application.—The construction of wills must be the same in courts of law and equity, 1 Bl. Rep. 377. Words tending to disinherit the heir at law, will not have that effect, unless the estate is completely devised to another. Dougl. 763. The common expression in the books that an heir shall not be disinherited, except by express words, or necessary implication, is incorrect: the proper terms of the rule are, that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited. *Moon d. Fag v. Heaseman*, Willes, 141. And where there is no ambiguity it has long ago been said by great authority, that a devisee is as much favoured as an heir at law. 6 Mod. 133. 2 Vern. 340. per Holt C. J. in *Falkland v. Bertie*. The order of words is not to be regarded, but a transposition may be made to render a limitation or disposition sensible, *Hob. 75. Spark v. Purnell*, 2 Vez. 32. *East v. Cook*, id. 74. *Duke of Marlborough v. Lord Godolphin*, id. 248. and see *Brice v. Smith*, Willes, 1. In respect to which a court of equity has no more power than a court of law. And this can only be done to come at the meaning of the testator, and not to alter or affect the operation of the devise: it ought never to be done where the words are plain and sensible, much less to let in different devisees or legatees in a will: for to do that would be to make a new will, *ibid. et vid. 2 Leon. 165. Blackler v. Webb*, 2 P. Wms. 384. Repugnant words may be rejected, *Boon v. Cornyforth*, 2 Vez. 278. *Cole v. Rawlinson*, 2 Lord Raym. 831. The devise of a trust is to be construed in the same manner as that of a legal estate, and not to be varied by subsequent accidents. *Atkinson v.*

If there are no expressions in a will giving in direct terms an estate of inheritance, nor any plain grounds for inferring an intention to give such estate, nothing passes away from the heir at law beyond an estate for life. Therefore, as before has been observed, a devise of land to a person ge-

Where there are no words giving an inheritance or plain grounds for inferring an intention so to do, the de-

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Hutchinson, 3 P. Wms. 259. The intent of the testator is to be the rule of construction if the words will bear it out; but if the force of the words be such that the intent cannot be complied with, the rule of law must take place, *Brownsword v. Edwards*, 2 Vez. 248. Loose, general, and doubtful words may be rejected as surplusage, where they oppose a plain precedent devise, or the broad and manifest intent of the testator. *Hob. 65. 6 Mod. 112.* Wills should be so construed as to preserve estates in the intended channel of descent, *Cro. Car. 185. 1 Leon. 285. 2 Vez. 615. 2 Str. 798.* Effect ought to be given, if possible, to the *whole* will, and a codicil is to be considered as part of it, *Gray v. Minethorpe*, 3 Vez. Jun. 105.; and a construction may be made to support the intention upon the *whole* will even against strict grammatical rules, 11 Vez. Jun. 148. But an express disposition cannot be controuled by inference, *Collett v. Lawrence*, 1 Vez. Jun. 269. Words of desire are of imperative obligation, if the object be certain, *Eccles v. England*, Prec. in Ch. 200. *Harland v. Trigg*, 1 Bro. C. C. 142. *Pierson v. Garnett*, 2 Bro. C. C. 38.; unless there is plainly a discretion intended to be given, *Cunliffe v. Cunliffe*, Ambl. 686. *Morris v. the Bishop of Durham*, 10 Vez. Jun. 522. If a testator uses technical phrases he must be supposed to understand them, unless by other parts of the will he manifests the contrary, *Phillips v. Garth*, 3 Bro. C. C. 60. *Green v. Howard*, 1 Bro. C. C. 31. 3 Bro. C. C. 234. And, *prima facie*, words must be understood in their *legal* sense, unless a contrary intent plainly appear, *Holloway v. Holloway*, 5 Vez. Jun. 401. It is an universal rule, that words having an obvious construction, are not to be rejected upon a suspicion that the testator did not know what he meant by them, *Milner v. Slater*, 8 Vez. Jun. 295. If a testator expresses himself incorrectly the court will supply proper words, if the meaning distinctly appear, *Dodson v. Hay*, 3 Bro. C. C.

vises takes  
only an es-  
tate for  
life.

nerally<sup>b</sup> disposes of nothing but an estate for the life of the devisee, and the addition of the word 'assigns' will not enlarge it. Accordingly, if a man devise in the following manner\*, "I devise Black Acre to

<sup>b</sup> *Fairfax v. Heron*, Prec. in Ch. 68.

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\* Vin. Abr. tit. Dev. (Q. a). But if a man devise Black Acre to one in tail, and also White Acre, the devisee will have an estate tail in White Acre also, for this is *all one sentence*, *ibid.* And so it has been held that if in the first clause *no devisee is named*, as where a testator says, "Item, I give the manor of D., Item, I give the manor of S. to J. K. and his heirs," this shall be referred to both the manors, and J. K. will have the fee in both. *Ibid.*

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404, *Doe d. Leach v. Mecklem*, 6 East, 486. But mistakes in a will are never to be intended if a reasonable construction can be found out, *Purse v. Snaplin*, 1 Atk. 415. General words will be controuled to render the whole will consistent, *Whitmore v. Trelawney*, 6 Vez. Jun. 129. Where there is no connection by grammatical construction, or by direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, though in its general terms and import it may be similar, and apply to persons standing in the same degree of relationship to the testator, *Wright ex dem. Compton v. Compton*, 9 East, 267. In trying the meaning of phrases used in a will all circumstances may be looked at, in which the court might have been called upon to determine the meaning of the same phrases applied to a different state of facts, *Earl of Radnor v. Shafto*, 11 Vez. Jun. 457.

Every word ought to have an effect if possible, and not inconsistent with the general intention, which if manifest is to controul, *Blandford v. Blandford*, Roll. R. 319. *Constantine v. Constantine*, 6 Vez. Jun. 100. The general words of a will may be restrained in cases where it appears that the devisor did not intend to use them in their general sense, *Strong v. Teate*, 2 Burr. 912. and *Doe on*

my daughter F. and the heirs of her body begotten ; Item, I devise to my said daughter White Acre ;" the daughter shall have but an estate for life in White Acre ; for the word 'item' has not the force of the words 'in the same manner,' or 'in formâ prædictâ,'

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dem. *Reade v. Reade*, 8 T. R. 118. ; but the safest course is to abide by the words ; unless upon the whole will there is something amounting almost to demonstration, that the plain meaning of the words is not the meaning of the testator, 9 Vez. Jun. 205. In every will there is a tacit condition both in law and equity, that whoever would derive a benefit under it must acquiesce in the whole of it, however disjointed the parts, *Molyneux v. Scott*, 1 Bl. Rep. 377.

Croke, Justice, laid down three rules which, he said, if observed, would open all the doors in every will : 1st. No will ought to be construed per parcella but by the entirety ; 2d. No contrariety or contradiction to be admitted ; 3d. No nugation, nor any thing nugatory ought to be in a will ; 2 Bulst. 178.

The same word in different parts of the same will should be construed in the same sense, *Whitmore v. Lord Craven*, 2 Ch. Ca. 169. unless the general intention calls strongly for a difference of construction ; and sometimes they may have a different force as applied to *different subjects*, *Forth v. Chapman*, 2 Vez. 616. It is an ordinary rule that where a former clause in a will is *express, positive, and particular*, a subsequent clause shall not enlarge it, *Roberts v. Kiffin*, Barn. C. R. 261. Constructions of wills shall be made according to estates at common law by *deed*, unless something in the intent of the will appear to the contrary, Carth. 5. per Bridgman, C. J. cites 6 Rep. 16. Wild's case. Wills in general are construed from the *making*, unless circumstances, or the tenor of them, shew that the construction should be from the *death*, but the *intermediate* time is not to be regarded, 1 Vez. 295.

The intention of a testator must be construed in consistency with the rules of law, so as not to be considered as intending to limit a fee upon a fee ; or to create a perpetuity ; to make a chattel descendible to heirs ; to put the freehold in abeyance ; or to

which would be tantamount to repeating the words of limitation.

And if a man, seised in fee of a house and land,

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prevent a tenant in tail from suffering a recovery, *Hodgson v. Ambrose*, Doug. 341.

If words admit of a two-fold construction, the rule is to adopt such as tend to make good the instrument, even in the case of a *deed*, much more of a *will*. The intention of a testator is not to fail because it cannot take effect to the full extent, but it is to work as far as it can, *Atkinson v. Hutchinson*, 3 P. Wms. 259.

A will is not to be controuled on account of an unmeritorious object; nor does the amount of property, nor the want of prudence in the disposition, afford a fair ground for controuling a will, *Theluson v. Woodford*, 4 Vez. Jun. 312, 313. 329. 340.

Where the whole property is given with a particular interest out of it, it operates by way of exception out of the absolute property; and where an absolute property is given, and a particular interest in the mean time, as until the devisee shall come of age, and when he shall be of age then to him and his heirs, the rule is that it shall not operate as a condition precedent, but as the description of the time when the remainder-man is to take in possession, *Goodtitle v. Whitby*, 1 Burr. 228. *Boraston's case*, 3 Rep. 16. *Doe v. Lea*, 5 T. R. 41. *Hanson v. Graham*, 6 Vez. Jun. 239. *Lane v. Goudge*, 9 Vez. Jun. 229.

'And' must be read as 'or,' where it is necessary, to put a reasonable construction on the will, 2 Atk. 643. *Read v. Snell*, 1 P. Wms. 434. and note 2. 3 Atk. 86. 193. 408. or where it is necessary to give effect to all the words, 7 Vez. Jun. 459. 3 Vez. Jun. 450. 6 Vez. Jun. 311. So 'or' is sometimes to be read as a copulative, *Cro. El.* 525. *Pollexfen*, 645. 2 Str. 1175. 3 Atk. 390. 1 Wils. 140. 9 East, 366. 6 Vez. Jun. 341. and a disjunctive at the end of a period shall not disjoin the preceding sentences, if the intent is against it, 3 Atk. 391. 12 Vez. Jun. 112. A *vide licet* shall be rejected if repugnant; not if it can be reconciled and made restrictive, *Wilson v. Mount*, 3 Vez. Jun. 194. *Rumbold v. Rumbold*, id. 65.

makes his will in this manner, “ I devise the moiety of my house to my wife for her life ; Item, I devise the other moiety of my house to J. S. ; Item, I devise to J. S. all the said house, and all the land that appertains to it after the death of my said wife ;” J. S. will take only an estate for life in the premises after the death of the wife<sup>a</sup>.

So if I devise Black Acre to J. S. Item, I devise White Acre to J. S. and his heirs, it is only an estate for life in Black Acre ; for the Item has no dependance upon the first clause, but is distinct and several.

The cases of *Denn v. Gaskin*<sup>d</sup>, and *Right v. Sidebotham*<sup>e</sup>, have been already produced as instances of the rule which will not suffer a greater estate than for the life of the devisee to pass by a will without proper words of limitation, or a plain indication on the face of the instrument of an intention in the testator to give an inheritance. The words of Lord Mansfield in the last-mentioned case are very declarative of the law on this subject.

“ I verily believe,” said his Lordship, “ that almost in every case, where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted ; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tanta-

<sup>a</sup> Vin. Abr. tit. Dev. (Q. a.)

<sup>d</sup> Cowp. 657. ante, Sect. 4.

<sup>e</sup> Dougl. 759. ante, Sect. 4.



mount, are necessary to pass an estate of inheritance, 'all my estate,' or 'all my interest,' will do; but 'all my lands, lying in such a place,' is not sufficient; such words are considered merely descriptive of the local situation, and only carry an estate for life; nor are words, tending to disinherit the heir at law, sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt, but that the testator's intention here was to disinherit his heir at law, as well as in the case of *Denn v. Gaskin*; but 'the only circumstance of difference between that case and this, and which has been relied on as in favour of the defendants, if the testator had any meaning by it, (which I do not believe he had) rather turns the other way; because he uses different words in devising different parts of his estate. I think we are bound by the case of *Denn v. Gaskin*.' Judgment that the widow took only a life estate in the last-mentioned premises.

So in another case, where C. B. being seised and possessed of freehold and leasehold property, lying contiguous, and demised together, made his will and devised to his wife all his freehold and leasehold messuages, &c. and all his estate and interest therein, for and during her natural life, and after her decease, he devised the said messuages to his sisters-in-law, M. S. and M. B., as tenants in common; but in case his mother should give any disturbance to his wife, then his will was, that the same should go to his kinsman, W. B., his heirs and assigns for ever; and charged his estate with the payment of all his just debts, to be paid out of the yearly rents of his estates by his said wife. Lord Mansfield said, there were no

words of limitation added to this devise, and therefore, that it was clear, by the rule of law, that it was only an estate for life, unless it could be found from the whole of the will taken together, and applied to the subject matter of this devise, that the testator's intention was to give a fee; and, accordingly, judgment that the sisters-in-law took only an estate for life<sup>f</sup>.

Sir R. Worsley, being seised in fee of the premises in question, devised them to trustees, upon trust that they should stand seised thereof, to the use of his grandson Robert, Earl of Granville, for life, remainder to his first, and other sons in tail male; remainder to Lady Carteret for life; remainder to her first and every other sons in tail male, and in default of such issue, “to the use of all and every the daughter and daughters of the body of the Lady Carteret, lawfully issuing, as tenants in common, and not as joint-tenants, and in default of such issue, to the use and behoof of his own right heirs for ever<sup>g</sup>.”

Lady Carteret had one daughter, Lady Catherine Hay; and the question was, what interest she took under this devise? A case was sent out of Chancery to the Court of King's Bench, for their opinion.

Lord Kenyon—The general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind, is, to collect the testator's intention,

<sup>f</sup> *Roe v. Blackett*, Cowp. 235.

<sup>g</sup> *Hay v. Earl of Coventry*, 3 Term Rep. 83.

from the words he has used in his will, and not from conjecture. It is not necessary that any technical or artificial form of words should be used in a will ; but we must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used. The objection then occurs in this case, "*voluit sed non dixit.*" The plaintiff's argument goes to shew, that the daughters took estates in tail general: but that could not have been the intention of the devisor, as no such estate is given in any part of the will, and the devisor has totally laid aside the daughters of the first devisee, and the daughters of his sons. The words here used, technically considered, only confer an estate for life on Lady Catherine Hay. It has been argued that we may presume an intention in the devisor, from other parts of the will, to give estates in succession to the daughters ; but I cannot find any words to warrant such a construction. If, indeed, the word 'such' had not been introduced into this clause, we might, perhaps, have said that, as 'issue' is '*genus generalissimum,*' it should include all the progeny, but here the word 'such' is relative, and restrains the words which accompany it.

The certificate was, that Lady Catherine Hay took an estate for life.

Where  
though the  
land is  
charged,  
only a life  
estate  
passes.

With respect to the consequence of charging the estate with the payment of a gross sum of money, or of debts or annuities, it has been shewn upon what principle this is considered as conferring the fee-simple upon the devisee, without words of limitation. But it is laid down in *Collier's case*, that a

devise to a person, to the intent that with the profits he should educate his daughter<sup>a</sup>, or of the profits of the land, pay to one so much, and to another so much, was but an estate for life, for he was sure to have no loss<sup>1</sup>. A distinction which has ever since been acknowledged, though the courts have occasionally felt themselves embarrassed on the application of it. Where a testator devised all his lands, tenements and messuages whatsoever, after his debts, legacies, and funeral expenses were discharged, to T. M.; it was said by Fortescue M. R. that here the debts were not *at all events* charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore it did not come up to the cases cited of a gross sum to be paid out of land, and consequently gave no more than an estate for life to the devisee<sup>2</sup>.

And in another case, where a testator devised as follows:—"I give and devise unto N. Lister, all that my customary estate, &c. and all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever; and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise and bequeath the same unto my wife Sissily Carr," and appointed her sole executrix. The question was, whether Sissily Carr took an estate in fee or only for life<sup>3</sup>.

<sup>a</sup> Bacon v. Hill, Cro. Eliz. 497.

<sup>1</sup> 6 Rep. 16 a.

<sup>2</sup> Merson v. Blackmore, 2 Atk. 340.

<sup>3</sup> Denn v. Mellor, 5 Term. Rep. 558.

Lord Kenyon said that where a devisee is directed to pay an annual rent charge, or a solid sum to another person, out of the estate devised, it had been properly decided that the devisee should take a fee, because he might be a loser unless the estate in his hands were at all events sufficient to enable him to bear those charges. Where a sum of money was given, it might be payable before the rents became due: and where an annual charge was made on the estate, it might continue beyond the life of the devisee, and, therefore, it was necessary, in both those cases, that the devisee should have a permanent fund. This case had been compared to that of *Doe v. Richards*<sup>m</sup>, but there the words were, "my legacies and funeral expenses being thereout paid;" which imported that those sums were to be paid by the devisee out of the interest given to her: and if she had died immediately after the deviser, and had only taken a life-estate, the fund out of which she was to bear those charges might have failed. The court was therefore compelled to make that decision, and he was now perfectly satisfied with it. But, in the case before the court, the words of the will were, "after payment of my just debts and funeral expenses." Now, supposing the deviser had, in the beginning of the will, charged his debts and funeral expences on his real estate, and had then, after a series of limitations, devised to his wife, in the words now used, it could not have been contended, that such a charge on the real estates would have passed the fee to his wife; and if not, the place in which the same words were introduced, could not vary the question. He

admitted that the real estate was charged with the payment of debts and funeral expenses, if the personalty was not sufficient for that purpose ; but there were no words *charging the estate in the hands of the wife*, with the payment of those debts. This, therefore, essentially distinguished the present case from that of *Doe v. Richards* ; for there, the debts were to be paid by the devisee, and were a charge on the estate in his hands ; whereas here, the debts were no charge on the devisee. Judgment was given, that *Sissily Carr* took only an estate for life.

On a writ of error in the Exchequer Chamber, this judgment was reversed, upon the ground that the words “ all the rest of the real estate,” created an estate in fee <sup>n</sup>.

On being afterwards carried into the House of Lords, the following question was put to the judges :—“ What estate the devisee, *Sissily Carr*, took in the premises in question ?” And the judges having taken time to consider the said question, the Lord Chief Baron of the Court of Exchequer delivered their unanimous opinion, that *Sissily Carr* took an estate for life in the premises in question. Whereupon the judgment of the Court of Exchequer Chamber was reversed, and the judgment of the Court of King’s Bench affirmed.

Again, where a testator made his will in these words :—As to what real and personal estate it hath pleased Almighty God to bless me with, I give and dispose of the same as followeth. First, my will is, that all my debts and funeral expenses be justly paid

off and discharged out of my personal estate, and if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, &c. unto William Allen of S. son of Thomas Allen of S. aforesaid, deceased. The question was, What estate passed by these words? And Lord Kenyon said, that the debts were not at all events charged upon the real estate, but only contingently, if the personal estate should not be sufficient, and therefore did not come up to the cases cited of a gross sum to be paid out of the land, and, consequently, gave no more than an estate for life to the devisee, and judgment was given accordingly\*.

Where words limiting an estate tail have been curtailed in their effect to a life estate by succeeding explanatory words.

In the last section many cases were produced to shew that an express estate to A. for life with remainder to a *definite* number of his sons in succession in tail, followed by a devise over in default of issue of A., affords a ground for construing A. to take an estate tail in order to carry the estate to *all* the children of the first taker. And the distinction between such a case and one wherein, after such express estate for life, the limitation was to all and every the son and sons in tail without limit, was pointed out. In *Lowe v. Davis*<sup>†</sup>, we have an instance of a contrary kind to those wherein an express estate for life has been enlarged into an estate tail, to effectuate the general intention of the testator. In that case, a devise to a man by words formally limiting an estate tail, was so restrained by subsequent words as to pass only an estate for life. The devise was to I. S. and his heirs lawfully to be begotten, that is to say, the first,

\* *Doe v. Allen*, 8 Term R. 497.

† 2 Lord Raym. 1561.

second, third, and every other son and sons successively, lawfully to be begotten of the body of the said I. S., and the heirs of the body of such first, second, third, and every other son and sons successively, lawfully issuing, as they shall be in seniority of age, and priority of birth, the eldest always and the heirs of his body to be preferred before the youngest and the heirs of his body, *and in default of such issue*, then to his right heirs for ever; and the court adjudged the estate of I. S. to be for life only, and not an entail.

The countess of S. devised lands to trustees to pay her debts and legacies, and then to settle the remainder one moiety *on her son Henry and the heirs of his body*, by a second wife, and in default of such issue to her son Francis, and the heirs of his body; the other moiety to Francis and the heirs of his body, with remainders over, and directed that it should never be put in the power of either to dock the entail. It was decreed that the sons should be only tenants for life, without impeachment of waste; and should not have an estate tail conveyed to them notwithstanding the express words of limitation<sup>a</sup>. The foundation of which decree was that the estate was not executed but only executory; and that therefore the intent and meaning of the testatrix was to be pursued. She had declared her mind to be that her sons should not have it in their power to bar their children, which they would have if an estate tail was to be conveyed to them. And it was said to be as strong in the case of such an executory disposition for the benefit of the issue, as if the like provision had been contained in marriage articles. But had she by her will devised to

Of the equitable construction of executory trusts in a will.

<sup>a</sup> Leonard v. the Earl of Sussex, 2 Vern. 526.



her sons an estate tail, the law must have taken place, notwithstanding any subsequent clause or declaration in the will, that they should not have power to dock the entail. And this agrees with, and well explains, what was said by Lord C. Harcourt in *Bale v. Coleman*, that “the intent must be construed according to what appears upon the will, and *according to the known rules of law.*”

It appears that the decision in the case just above stated was grounded upon the latitude afforded to the court to interfere in moulding the settlement of which the will was *directory*, according to the spirit, though not according to the letter of the will. But where the devise is *immediate* in its operation, not directing a settlement, but settling the estate by positive limitations, even though the subject of the devise is a trust estate, such equitable limitations seem to be subject to the same strict construction as legal estates, and to afford no room for the exercise of judicial discretion in departing from the letter of the will to effectuate the general and presumable purposes of a settlement. And such appears to have been the principle which governed Lord Harcourt in his reversal of the decree of Lord Cowper in *Bale v. Coleman*†.

In that case the testator devised to trustees and their heirs for payment of debts and legacies, and after debts and legacies paid, willed that one fourth part should be and remain *in trust* for E. for life, with power of leasing; and after her decease, *in trust* for C. for and during the term of his life, with like power of leasing, and after his decease to the heirs male of

the body of C., remainder over. This being the devise of a trust, Lord Cowper conceived that it differed from an immediate devise, and that it was rather to be looked upon in the nature of an *executory* devise, to take effect after debts paid; or in the nature of marriage articles; besides that the enabling C. to make leases seemed to imply very strongly, that he was to have no power to dispose of the inheritance.

But the same cause coming on before Lord Harcourt, upon a rehearing, he said the case of a will differed from the cases of marriage articles, in the nature of which the issue were particularly considered, and looked upon as purchasers. That in cases of a will where the parties claim voluntarily, *the testator's intent must be presumed to be consistent with the rules of law*; and that at law the same words would certainly create an estate tail. That it could not be inferred with any certainty from the power of leasing, that no estate tail was intended, such power being more beneficial than that which was given to a tenant in tail by the statute; and as the debts were admitted by the pleadings to be all paid, the same construction was to be made as if there had been originally no trust. His Lordship, upon these grounds decreed A.'s share to be conveyed to him and the heirs male of his body.

We do not find that distinction alluded to by Lord Harcourt in the above case, which has been so frequently recognized in other cases, namely, between executed and executory trusts; but on the negative side as denying to executed trusts a greater latitude of construction than is conceded to the limitations of legal estates, his doctrine has the support of a very prevailing

series of authorities. Lord Harcourt was not called upon to make any distinction between trusts executed and immediate, and trusts executory and prospective, as the trusts in the case before him were undoubtedly of the former kind, and the decision of his Lordship proceeds upon the analogy between this description of trusts and limitations of the legal estate. Instead of simply denying the resemblance of these executed and completed estates in equity to the case of articles directory of a future settlement, he takes rather too broad a ground by insisting on the supposed propriety of a severer construction of wills than of marriage articles, drawn from the distinct natures of the instruments themselves, which would extend such severer construction to executory as well as to executed trusts if contained in a will.

**Of the distinction between executed and executory trusts.**

The distinction between these two descriptions of trusts has been the hinge on which a great many important, and much considered adjudications have turned; and without resorting to which, we should in vain search for a principle to reconcile the cases on the subject. In the case of the *Earl of Stamford v. Lord Hobart*\* determined by Lord C. Cowper, whose decree was affirmed by the Lords, the opinion of Lord Harcourt as to the propriety of putting a stricter construction in general upon wills than marriage-articles, was implicitly denied. It was there observed that, as it was usual for equity, in cases of executory articles for settling of estates, to supply informalities and defects, especially when the things supplied were necessary to support the main intent of the parties, and to carry such articles into execution, according to that intent,

\* 1 Bro. P. C. 288.

as far as it might agree with law, though not strictly according to the words and penning of the articles ; so *a fortiori* would equity do in the case of a will, where the same was to be executed by a conveyance to be made.

If the view of this doctrine taken in the last cited case be a correct one, Lord Harcourt's general reasoning from the distinct characters of the instruments themselves, the one, *i. e.* marriage articles being considered as standing on obligatory and valuable considerations, the other on the mere intention and voluntary bounty of the testator, seems to have gone too far, and further than was necessary for the support of his decision of the case before him ; there being quite sufficient ground for it in the analogy between trust estates executed or fully limited, and estates at law, and in the sound intelligible maxim of *equitas sequitur legem*. I have insisted the more on this point, because in the learned and elaborate discussion of these cases by the late Mr. Fearne, that profound writer seems to lend some countenance to this mode of treating the subject.

The strict consideration of trust estates which was the ground of the decision in *Bale v. Coleman* was fully adopted by Lord Hardwicke in *Garth v. Baldwin*<sup>1</sup>. In which case, there was a devise of lands to a trustee, in trust to pay the rents and profits to S. for her separate use for her life, as if she were sole ; and after her decease to pay the same to E. her son for life, and afterwards to pay the same to the heirs of his body, and for want of such issue, to pay the

<sup>1</sup> 2 Vez. 646.

same to all and every other son or sons of the body of S. begotten, &c. Upon the question whether E. was entitled to the lands in tail, or for life only, Lord Hardwicke proceeded on this principle, namely, that in limitations of a trust either of a real or personal estate to be determined in that court, the construction ought to be made according to the construction of limitations of a legal estate, unless the intent of the testator or author of the trust plainly appears to the contrary. He laid it down as a maxim, that he was not, in a court of equity, to overrule the legal construction of the limitation, unless the intent of the testator or author of the trust appeared by declaration plain, viz. by plain expression or necessary implication. And accordingly he decreed a conveyance in tail to B.

It could scarcely have been expected that after the decree of Lord Hardwicke in *Bagshaw v. Spencer*<sup>a</sup>, his Lordship would have reasoned as we find him doing in *Garth v. Baldwin* just above cited: for in *Bagshaw v. Spencer*, the expressed ground of the decision was the distinction between a trust in equity, and a mere legal estate; his Lordship at the same time declaring that *all trusts* in notion of law were *executory*, and that the distinction between trusts executed and executory had never been established.

Again in the case of *Roberts v. Dixwell*<sup>b</sup> Lord Hardwicke observed, that the latter part of the trust was merely executory, to be carried into execution after the performance of the antecedent trusts. That the whole direction, therefore, fell upon the court, and

<sup>a</sup> 1 Vez. 142. 2 Atk. 246. 570. 577.

<sup>b</sup> 1 Atk. 607.

they were to direct how the parties were to convey. He said, that the Court had taken much greater liberties in the construction of *executory* trusts, than where the trusts were actually executed ; and directed a conveyance to the sons successively in tail, it being not a trust executed, but *executory*.

Thus notwithstanding the reasoning of Lord Hardwicke in *Bagshaw v. Spencer*, he will be found in other cases decided by him both before and after that case, to have upheld by his authority the distinction taken by Lord Talbot in *Lord Glenorchy v. Bosville*<sup>\*</sup>, which may be considered as the great case upon the subject. The devise in that case was to trustees, and their heirs, in trust till the marriage, or death of the testator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance ; and, as to the residue, to pay his debts and legacies, and after payment thereof, in trust for his grand-daughter, and if she married a Protestant, after her coming of age, or with consent, then to convey the estate after such marriage, to the use of her for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body with several remainders over ; and one of the questions was, whether *Lady Glenorchy*, (the grand-daughter) under this will was tenant for life or in tail. Lord Talbot said he should have made no difficulty of determining this to be an estate tail had it been the case of an *immediate* devise. He thought, in cases of trusts executed, or immediate devises, the construction of the courts of law and equity ought to be the same, for there the testator did not suppose any other

<sup>\*</sup> Ca. Temp. Talb. 3.

conveyance would be made. That the case of *Papillon v. Voice*<sup>†</sup> seemed a strong authority for executing the intent in executory trusts, as well as in marriage articles; and he accordingly decreed to Lady Glenorchy only an *estate for life* with remainder to her first and other sons in tail male, &c.

Of the opinion of Mr. Fearne; and the judicial declarations of Lord Thurlow, and Lord Eldon.

It would be useless to cite more cases upon this subject. All of them which had taken place before and during his time have been collected, and reasoned upon by Mr. Fearne in his *Essay on Contingent Remainders*, whose opinion was strongly in favour, as well of the close analogy between trust estates executed and legal estates, as of the distinction between such executed trust estates, and such trusts as are executory, and which leave something to be done on which a court of equity may ground its special interference to carry the intent of a testator into full effect. We may conclude with observing, that Lord Thurlow in *Jones v. Morgan*<sup>‡</sup>, adhered to the principle of applying the same rules to trust as to legal estates where the devise is immediate; and that Lord Eldon in the important case of the *Countess of Lincoln v. the Duke of Newcastle*<sup>§</sup>, said, that there is a distinction between a will making a direct gift, and a covenant by articles to be executed, but none between a covenant in consideration of marriage, and an executory trust by will.

<sup>†</sup> 2 P. Wms. 471.    <sup>‡</sup> 1 Bro. C. C. 206.    <sup>§</sup> 12 Vez. Jun. 218.

## SECTION VII.

*What words create a Joint-Tenancy, and what a Tenancy in common in a Will.*

**INDEPENDENTLY** of all inference to be drawn from the contents of the will, it is well settled that a devise to two or more generally, or to two or more and their heirs, makes them joint-tenants.

Courts both of law and equity are said now to lean *against* joint-tenancy; though formerly it was otherwise, upon the ground of the inconvenience of multiplying services under the old tenures<sup>a</sup>. Any words therefore, importing an equality of benefit, will lead to the construction of a tenancy in common. Thus, nothing is better settled than that in a will, the words "equally to be divided" will create a tenancy in common.

Courts of law and equity lean against the construction of a joint-tenancy.

But it sometimes happens that after such *distributive* words the testator adds an express limitation *to the survivor*, or directs that the estate may be enjoyed with benefit of *survivorship*; which has a tendency to embarrass the construction. It has been laid down in positive terms that where lands are devised to two or more persons, to hold to them and the survivor of them, they will take an estate in joint-tenancy, though there may be other words in the will indicating a tenancy in common<sup>b</sup>. And Lord Hale has said, that a devise to two equally to be divided between them, and *to the survivor* of them, makes

What has been the construction where there are words importing an equality of interest, and also a survivorship among the devisees.

<sup>a</sup> 3 Atk. 524.

<sup>b</sup> *Furse v. Weekes*, 2 Roll. Ab. 90.



an estate in joint-tenancy upon the express import of the last words<sup>c</sup>. But this doctrine has not prevailed in later cases, in which the courts have been ingenious to give effect to the words of severance without sacrificing the words of survivorship.

In some cases, however, the construction of words in a will, as importing a joint-tenancy, has been favoured as tending to effectuate and preserve the estates. As where a testator devised to Jane and Elizabeth all his estate, to be equally divided between them during their natural lives, and, after the deceases of the said Jane and Elizabeth, to the right heirs of Jane for ever; the only question was, whether this devise made Jane and Elizabeth joint-tenants for life, so as that, upon the death of Jane, the whole survived to Elizabeth for life; or whether, upon the words "equally to be divided between them," they were tenants in common<sup>d</sup>?

Lord Chief Justice Holt pronounced the opinion of the Court that they were joint-tenants, notwithstanding the words "equally to be divided among them," and that the lands ought to survive to Elizabeth: 1st. Because, though upon such words, generally they would be tenants in common; yet if it should be so in this case, it would be expressly against the intent of the testator, and would defeat the heirs of Jane of part; for they were to take altogether, and not by moieties, one at one time, and one at another, but all at once; if they should be tenants in common, they must take by moieties at several times. 2dly, It

<sup>c</sup> 1 Vent. 216.

<sup>d</sup> Tuckerman v. Jeffries, 3 Bac. Abr. 681. Holt, 370.

was expressed that the heirs of Jane were not to take till after both their deceases. 3dly, If they should be tenants in common, then the heirs of Jane would be in danger to lose a moiety; for, as to that one moiety, it must be a contingent remainder; so that if Elizabeth had died during the life of Jane, the contingency for that moiety not happening [*when the particular estate determined,*] it must descend to the heirs at law of the testator, who were Elizabeth and the issue of Jane, as coparceners. 4thly, Jane and Elizabeth were heirs at law of the testator, and, as such, the whole would have descended to them in coparcenary, if no will had been made; but it was plain, the testator intended to prefer the heirs of Jane to the whole. It was therefore adjudged that Elizabeth and Jane took as joint-tenants.

A. Haws devised all his estate in D. to his four younger children, A., B., C., and D., their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, *with benefit of survivorship*\*. Lord Hardwicke said, that, in Chancery, joint-tenancies were not favoured; because they were a kind of estate that did not make provision for posterity: neither did courts of law at this day favour them, though Lord Coke says, that joint-tenancy is favoured, because the law was against the division of tenures: but, as tenures were abolished, that reason had ceased, and courts of law inclined the same way with the courts of equity. Another was, that where there were contradictory words in a will, the court made a reasonable and uniform construction, and would re-

\* *Haws v. Haws*, 3 Atk. 523. 1 Wils. R. 165.

ject such words as were absurd, and contradictory to the intent of the testator. The words "equally to be divided," in a will made a tenancy in common ; here was also added, "as tenants in common, and not as joint-tenants," which are very strong words ; but then, it was also said, "with benefit of survivorship," which last words created the difficulty in the case ; that is, to know at what time the testator intended this benefit of survivorship should take place. This might be explained by another part of the will, where he plainly pointed out a survivorship among the children themselves, as to personal estate, where the words were, "If any of my younger children die under age and unmarried, then I direct that the share of him so dying, shall go to the survivors." Then he came to this devise of his real estate, to his said four younger children ; but it was true he did not say, with the like benefit of survivorship. He thought it was natural to consider this as a fund or provision for these four children ; and that he meant, if any of them should die before 21, or unmarried, that the share of the child so dying should go among the other children : and he was of opinion that C. dying under age, his share did survive to the others, and should not go to the heir at law.

Adverting to what had been urged in argument, viz. that by the words "with benefit of survivorship," might mean to prevent a lapse if one or more died in the life-time of the testator, his Lordship seemed to think this too nice a construction, and observed that it was not probable that the testator meant by the '*benefit of survivorship*,' survivorship of himself ; for a testator seldom provides for a contingency in his own life-time, for when any such happens he may alter his will if he

pleases. But, continued his Lordship, if no other reasonable construction can be put upon these words, the court ought to resort to it, as in the case of *Lord Bindon v. the Earl of Suffolk*<sup>†</sup>; which was the case of a devise to five grand-children, share and share alike, equally to be divided between them, and if any of them die, then *to the survivor*, and they were held to take as tenants in common; for by the words "if any of them die, his share shall go to the survivor," Lord Cowper said, it must be intended, if any of them should die in the life-time of the testator, for by that construction every word of the will would have its effect and operation.

And in the case of *Rose d. Vere v. Hill*<sup>‡</sup>, where the devise was to the testator's five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants, Lord Mansfield and the Court of King's Bench, considered the devise as creating a tenancy in common in fee, and that the words "survivors and survivor" related to the death of the testator.

But where J. S. devised lands to A. and B. and the *survivor of them*, and their heirs and assigns for ever, equally to be divided between them, share and share alike, and A. died in the testator's life-time, and then the testator died, leaving C. his heir at law, the court said, that wills must be so expounded that, if possible, every word might have its effect. That, in that case the devise being to two and the *survivor of them*, they were plainly joint-tenants for life; and that the next words "and to their heirs equally to be divided

<sup>†</sup> 1 P. Wms, 96.

<sup>‡</sup> 3 Burr. 1881.

between them, share and share alike," as plainly imported them to be tenants in common of the inheritance, by which construction every word of the will took effect. But A. having died in the testator's lifetime, B. became thereby entitled to the whole for his life; and the inheritance of A. having lapsed by his death, his moiety must descend to C. as the testator's heir at law<sup>b</sup>.

Of the effect of two different dispositions of the same estate in a will.

Where there are two different dispositions of the same estate in a will, the better opinion seems to be that the two devisees shall take in moieties: though Lord Coke was of opinion that the latter words revoked the former<sup>1</sup>. In many of the old books it is said generally, that there should be a joint-tenancy<sup>a</sup>; but Mr. Hargrave observes, that according to the modern opinions, and, it seems, the best, there will be a joint-tenancy, or tenancy in common, according to the words used in limiting the two estates; by which it is meant, that, if the two estates given by the will have the unity or sameness of interest, essential to a joint-tenancy, the devisees shall be joint-tenants; but, if otherwise, they shall be tenants in common.

The courts have laid hold of slight words in favour of a tenancy in common.

The books abound in cases in which, where real or personal estate is devised to two or more persons, the courts have shewn an inclination to lay hold of any words in the will indicating an intention to make an equal partition of the property, to construe it a tenancy in common. A man devised his lands to his wife for life, the remainder to A., B., and C., and their heirs *respectively*, for ever. And the question being, whether A., B., and C., were joint-tenants, or tenants in common,

<sup>a</sup> Barker v. Giles, 2 P. Wms. 280.

<sup>1</sup> Co. Litt. 112. 6. n. 1. 2 Atk. 373. 3 Atk. 493. <sup>2</sup> Plowd. 539.

the court held that they were tenants in common: for the intent of the deviser appeared in the will, that every one should have his part, and *their heirs*; so here was a provision made for children; and the word 'respectively,' would be idle, if another construction should be made, and would signify no more than what the law said without it<sup>1</sup>.

So, where lands were devised to five persons, their heirs and assigns, all of them to have *part and part alike*, and the one to have as much as the other; it was adjudged to be a tenancy in common<sup>m</sup>.

Again, where L. devised lands to his two sons *equally*, and their heirs, it was adjudged, that the devisees took as tenants in common; for, otherwise, the word 'equally,' would have no meaning<sup>n</sup>.

A person devised a messuage with the appurtenances, unto M. G. and T. R. *equally* to them, his sister's sons. Lord Mansfield said, there was no room for argument; 'equally' implied a division; whereas, if they were to take as joint-tenants, there would be no division<sup>o</sup>.

A man devised lands to his two sons and their heirs, and the longer liver of them, *equally* to be divided between them and their heirs, after the death of his wife. The court was of opinion, that the sons were tenants in common, and that the devise was good; and the reason was grounded upon the construction of

<sup>1</sup> *Torret v. Frampton*, Style, 434. and see the same point in *Heathe v. Heathe*, 2 Salk. 123.

<sup>m</sup> *James v. Collins*, Het. 22. Cro. Car. 75.

<sup>n</sup> *Lewen v. Cox*, Cro. Eliz. 693. 1 Vern. 32.

<sup>o</sup> *Denn v. Gaskin*, Cowp. 657.

wills, that it ought to be according to the intent of the devisor: his intent appearing to be not only to provide for his two sons, but for their posterity; and that not only his two sons, but their heirs, should have an equal part: for the words were, "equally to be divided between them and their heirs." And though, by the first words it was given to them and the survivor of them, yet the last words explained what he intended by the word 'survivor;' that the survivor should have an equal division with the heirs of him who should die first. And, though the testator had not aptly expressed himself, yet, upon all the words taken together, his meaning seemed to be so<sup>p</sup>.

A person devised a freehold estate to trustees and their heirs, in trust to permit his three sisters and their assigns to hold and enjoy the said premises, and to receive the rents thereof, to their sole and separate use; and as his sisters *should severally die*, he gave the premises to their several heirs. Lord Hardwicke held, that the plain meaning of the words, "as they severally die," &c. was, that the sisters should take as tenants in common<sup>q</sup>. And in another case, a devise of the profits of land in trust for the testator's six younger children, to be distributed among them in *joint* and *equal* proportions, was held to give a tenancy in common, and not a joint-tenancy<sup>r</sup>.

A testator devised all his real estates to trustees, as soon as his three daughters should attain their respective ages of twenty-one, to convey to them *and the heirs of their bodies, and their heirs, as joint-*

<sup>p</sup> *Blisset v. Cranwell*, Salk. 226.

<sup>q</sup> *Sheppard v. Gibbons*, 2 Atk. 441.

<sup>r</sup> *Ettricke v. Ettricke*, Ambl. 656.

*tenants.* Lord Hardwicke, after observing that, on account of the direction to convey, this was an executory trust, in which case, the court assumed greater latitude of moulding the will according to the intention of the testator, gave his opinion, that the daughters did not take as joint-tenants, but that conveyances should be made to them at twenty-one respectively, in tail, with cross remainders in tail; by which means, survivorship would be preserved upon the death of any daughter without issue, which was the most that was meant by joint-tenants\*.

Robert Clarke devised his estate to trustees, and their heirs, to the use of the testator's niece Susannah Clarke, and his two nieces Elizabeth Garland and Ann Corry, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint-tenants, and for want of such issue remainder over†.

Upon a case sent by the Master of the Rolls for the opinion of the Court of Common Pleas, the Judges of that court certified, that the devisees took as tenants in common.

T. S. devised a term for years and all her interest therein to her two daughters; they paying yearly to her son 25*l.* by quarterly payments, viz. each of them 12*l.* 10*s.* yearly out of the rents of the premises, during his life, if the term so long continued. This was clearly held a tenancy in common, by Lord C. Jeffries, the 25*l.* being to be paid by the two daughters equally in moieties".

\* *Maryat v. Townley*, 1 Vez. 102.

† *Garland v. Thomas*, 1 N. R. 82.



But where no expressions occur to favour a tenancy in common, courts will not build the construction on conjectural grounds: nor will the subject matter supply an argument one way or the other.

But although according to these cases, and a great many more that might be produced, the inclination of the courts against the construction of joint-tenancies, disposes them to give effect to the slightest expressions indicating the intention to benefit the devisees equally; yet where no such expressions occur, the courts will not, on conjectural grounds, make a construction which has no foundation in the will itself to support it. Nor will the subject matter of the devise or legacy supply any argument one way or the other. And in the case of a mere money legacy, the rule is the same. Thus the present Lord Chancellor, in a late case <sup>\*</sup>, stated that, upon the doubt which Lord Thurlow had expressed in *Perkins v. Baynton* <sup>†</sup> whether there could be a joint-tenancy of a mere money legacy or a residue, and the cases cited upon the distinctions attempted upon the question, where the residuary legatees were executors, he had looked at one of the original wills in Doctor's Commons, where a construction had been put upon these bequests; and he had made up his mind upon the point, upon which he had never any doubt since, that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint-tenancy.

<sup>\*</sup> *Kew v. Rouse*, 1 Vern. 353.

<sup>†</sup> *Crooke v. De Vandez*, 9 Vez. Jun. 197.    <sup>\*</sup> 1 Bro. C. C. 118.

END OF VOL. I.

**TREATISE**  
**ON THE**  
**LAW**  
**OF**  
**WILLS AND CODICILS.**

---

**By WILLIAM ROBERTS,**  
*OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.*

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**MUCH ENLARGED AND IMPROVED.**

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A  
TREATISE  
ON  
WILLS AND CODICILS.

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CHAP. I.

PRESUMPTIONS AND PAROL EVIDENCE.

---

SECT. I.

*Double Portions.*

**T**HE rule prevailing in courts both of law and equity, that external evidence may be received to REBUT PRESUMPTIONS, submits the operation of written instruments, more extensively than any principle hitherto noticed, to the controul of extrinsic circumstances. In Courts of Equity, more especially, this allowance has prevailed. The genius of the common law inclines it to generality and certainty, and even its presumptions are in some cases too inflexible to be disproved. But equity, as its rules are framed more for particular than general relief, allows all its presumptions to be repelled by opposite testimony, and by testimony of every kind.

Of the presumption against double portions.

Thus it is a settled rule of presumption in equity, (borrowed from the civil law) that if a father gives a legacy to a child, and afterwards advances the like sum to the same child, such advancement operates as an ademption of the legacy. This presumption was opposed in *Ellison v. Cookson*<sup>a</sup>, by extrinsic evidence, consisting of declarations and correspondence, which were admitted on the above doctrine of receiving parol evidence against presumptions; though, as, in the opinion of the court, the evidence when received did not with sufficient clearness demonstrate any intention of the testator opposed to the presumption, the presumption prevailed. In *Debeze v. Mann*<sup>b</sup>, (which, indeed, was the case of a father and putative child, but the legacy being *expressed* to be for a portion it came up to the principle upon which the presumption is founded in the case of a general legacy by a lawful parent) (1) the presumption was repelled by parol evidence of words used in conversation, clearly importing a design to better the child beyond the extent of the advancement, and because there was no way of carrying into effect such design, but by construing the legacy to be unadecmed.

The doctrine of the Court of Chancery seems to be this; that where a parent gives a legacy to a child, *without stating any purpose for which it is given*, it

<sup>a</sup> 1 Vez. Jun. 100.

<sup>b</sup> 2 Br. C. R. 165.

---

(1) The cases of a natural child, vide *Grave v. Lord Salisbury*, 1 Bro. C. R. 425. and of uncle and niece, vide *Shudall v. Jekyll*, 2 Atk. 516. are said to be out of the rule.

is nevertheless to be understood as a portion, and therefore on the principle of leaning against double portions, if the father afterwards advances a portion on the marriage of that child, it is an ademption of the legacy by a constructive satisfaction of it in the whole or in part. But if a stranger gives a legacy to a child, *not describing it as a portion*, and afterwards makes such advancement by way of marriage portion, such subsequent advancement will not be construed an ademption or satisfaction of the legacy. In the case of a stranger either the legacy must be described as a portion, or the advancement must be expressly stated, or distinctly appear, to have been made for the very purpose of satisfying the legacy. In such a case, although the advancement is expressly made by way of marriage portion, still if the legacy is not expressly given for the same purpose, such advancement will not operate as an ademption.

It follows, therefore, that as the law does not recognize the relation of the putative father and legitimate child, the father stands as a stranger; and thus the case of an illegitimate child has in this respect an advantage over one legitimately born; since if a legacy, be given to him by his putative father, such legacy will not be covered by any subsequent advancement unless it appears positively that such advancement was intended to be a satisfaction of the legacy. A legacy from a father is understood as a *portion*, though not so described; what he gives thus to his child is presumed to be meant by way of provision, as paying a debt of love and natural affection; if, therefore, he afterwards advances him by a provision in his lifetime such provision is considered as given in the same spirit and feeling, and as paying the same debt of na-

ture which he had intended to discharge by his will. But in the case of a stranger, what he gives by his will he gives as a mere bounty, and what he afterwards advances, he gives as an addition to his first bounty. Where these double gifts take place between parent and child the presumption of satisfaction takes place notwithstanding slight circumstances of difference between the advancement and the portion, and a difference in the amount<sup>c</sup>.

And it would seem that where a testator standing or acting in loco parentis, after giving a legacy to the object of his care, makes a provision in his lifetime for the legatee, such advancement will be presumed to be in satisfaction. At least parol evidence will be easily let in to shew that the legacy was intended as a provision or portion<sup>d</sup>.

<sup>c</sup> *Pye ex parte Dubost ex parte*, 18 Vez. Jun. 140.

<sup>d</sup> 7 Vez. Jun. 508. and *Monck v. Lord Monck*, 1 Ball and Beatty's Reports, 298.

## SECTION II.

*Debts paid by Legacies.*

IT is also a rule of presumption well established in Courts of Equity, that where a legacy is given by a debtor to his creditor, exceeding, or equal to, the amount of the debt, it is a satisfaction of the debt. This rule of presumption, though established, is met by another, viz. that every bequest is *prima facie* a benevolence (1); on which ground the courts have of late viewed it with great jealousy, and have shewn a very ready disposition to take cases out of it, wherever any thing could be collected from the will, indicative of a contrary intention in the testator (2).

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(1) See the remark of Lord Chancellor Talbot in *Fowler v. Fowler*, 2 P. Wms. 353. and of Lord Hardwicke in *Richardson v. Greese*, 3 Atk. 68. who there says, that the maxim of *debitor non præsuntur donare* would not hold, if it were to be reconsidered. And again, that “legacies naturally imply a bounty.” And observe what was remarked by Lord King, in reversing the decree of the Master of the Rolls, in *Chauncey’s case*, 1 P. Wms. 410. Lord Alvanley also called it a very absurd rule, 3 Vez. Jun. 466.

Of the opposite influences of the conflicting rules—that a debtor is not to be presumed to intend a gift to his debtor, and, that legacies imply a bounty.

(2) I do not undertake to enumerate all the circumstances which will take a case out of the operation of this rule of presumption. The following, however, are the most prominent. Where the payment of debts is particularly mentioned in the will, *Chauncey’s case*, 1 P. Wms. 409. If the legacy is contingent, *Spinks v. Robins*, 2 Atk. 491. Postponement of the period of the payment of



But notwithstanding the strong disposition of the courts to bound the application of this rule of presumption, parol evidence has been refused by great chancellors to be admitted to take a case out of its operation. Thus in *Fowler v. Fowler*<sup>a</sup>, Lord Talbot, after having at the same time declared his disapprobation of the maxim, and his apprehension of the danger of attempting to alter it, observed that, though in some cases (3) parol evidence had been allowed, in order to shew that the testator designed to give the legacy, exclusive of the debt; yet his opinion was against admitting such evidence, for then the witnesses and not the testator would make the will. And in *Richardson v. Greese*<sup>b</sup>, Lord Hardwicke, after remarking that the court had always shewn itself dissatisfied with the rule, and had been fond of distinguishing cases out of it, observed that these distinctions were not to be taken from particular circumstances de hors the will, but must be found in the will itself.

Of the distinction

Whether the rule is a rule merely of presumption

<sup>a</sup> 3 P. Wms. 353.

<sup>b</sup> 3 Atk. 60.

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the legacy, *Clarke v. Sewell*, 3 Atk. 96. *Nicholls v. Judson*, 2 Atk. 300. Uncertainty as to duration or commencement, *Matthews v. Matthews*, 2 Vez. 635. The subjects of the debt and legacy not being *ejusdem generis*, *Broughton v. Errington*, 7 Bro. P. C. 12. *Eastwood v. Vincke*, 2 P. Wms. 614. Where the debt is incurred after the date of the will, *Cranmer's case*, Salk. 508. *Thomas v. Bennett*, 2 P. Wms. 341. *Fowler v. Fowler*, 3 P. Wms. 354. Where the legacy is to a servant, 3 Atk. 69. by Lord Hardwicke.

(3) This had been positively so adjudged, thirty years before, in *Cuthbert v. Peacock*, 2 Vern. 593.

or of settled and fixed construction, seems to be the true question upon which these decisions turn ; for where a positive rule of construction is established by the maxims or practice of the court, the instrument to which such positive rule of construction applies, becomes incapable of any other sense or operation ; so that to oppose such construction, is to contradict the instrument itself.

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If, therefore, this presumption of a legacy's being a satisfaction of a debt could be shewn to be established upon a technical and positive rule of *construction*, a sufficient reason would appear for the rejection by the courts of all extrinsic evidence to oppose its operation, however easily such an odious rule might give way to opposite inferences, arising out of the context and apparent design of the instrument itself.

In the case of double portions, when the testator subsequently advances the legatee, the *presumption* is not connected with any rule of *construction*, since the will is in that case not affected by construction, but, pro tanto, *revoked* by a presumption arising entirely out of an act of the testator posterior to the will : but where a legacy is presumed a satisfaction, the will has an *operation* and *construction* ; though, by being made to act upon a sum already due to the legatee, the benefit, *primâ facie* intended, is lost.

SECTION III.

*Double Legacies.*

Double legacies by the same instrument.

WHERE the same thing is given to different persons by the same instrument, the decisions must necessarily turn *wholly* upon construction. And though the rule of construction is differently stated by very high authorities, some considering the last bequest as revoking the first, others regarding both as co-operating to effect a joint-tenancy, and others again regarding them as rendering each other void for uncertainty ; yet I conceive, that, whichever of these opinions be right, parol evidence is to have no share in determining the operation. But the question is opened again, if we advert to the case of two legacies to the same person by *different* instruments, in which the rule of construing the bequests accumulative, seems to rest upon a slight foundation<sup>a</sup>, and to be easily repelled by *internal* evidence. But it is still a matter of enquiry, how far extrinsic evidence can be received for this purpose<sup>b</sup>.

By different instruments.

In *Barclay v. Wainwright*<sup>c</sup>, his Honour referred it to the Master to enquire, whether the several persons, legatees by the first codicil, to whom *no* legacies were given by the second, were dead, or not, in the service of the testator at the date of the second

<sup>a</sup> *James v. Semmens*, 2 H. Bl. 213.

<sup>b</sup> See *Cliffe v. Gibbons*, 2 Lord Raym. 1324.

<sup>c</sup> 3 Vez. Jun. 462.

codicil, and such facts were received for the sake of assisting and elucidating the internal evidence, by shewing that the omission of certain legatees named in the will, did not spring from any new intention of the testator.

The same Judge, in a case of double legacies, which afterwards came before him<sup>d</sup>, upon the question, whether the parol evidence could be admitted, observed, that “if it is an established rule that two legacies are accumulative, where they are given by different instruments, he could not raise a presumption by evidence against it, and he was inclined to think it must be taken to be a rule.” The rule was also laid down in *Ridges v. Morrison*\*, by Lord Chancellor Thurlow—“that where a testator gives a legacy by a codicil as well as by his will, whether it be *more, less, or equal*, to the same person who is legatee in the will, it is an accumulation.” The same Chancellor adds, that it is incumbent upon the executor to produce *evidence* to the contrary, if he contest such accumulation. But the *species* of evidence to which his Lordship afterwards adverts, is wholly internal, and arising out of the context of the instruments. The rule, as laid down in the case just alluded to, was adopted from *Hooley v. Hatton*, (see the note at the end of the case of *Ridges v. Morrison*,) which case of *Hooley v. Hatton*, Lord Thurlow observed, was examined with abundant care, and he accompanied that observation with a remark, that it was unnecessary to repeat the cases after reading the very able opinion of Mr. J. Aston, which, he

State of the doctrine as to the presumption of the courts in the cases of double legacies, in the same, and in distinct instruments.

<sup>d</sup> *Osborne v. Duke of Leeds*, 5 Vez. Jun. 269.

\* 1 Bro. C. C. 389.

said, contained the whole doctrine of the law upon the subject.

The state of the presumption, according to the varying circumstances of the case, seems to be settled by the result of the authorities upon the following criteria, viz. where the same *specific thing or corpus* (as a diamond ring, where the testator has but one,) is twice given to the same person, either by the same instrument, or by different instruments, there, in the nature of the thing, it is but a repetition.—Where the same *quantity*, as 100*l.* is twice given by the *same* instrument, the presumption *simpliciter* is against the legatee:—But where the same *quantity* is given by the same instrument, with any additional cause assigned for it, or with any material circumstance of variation accompanying the second gift, the presumption is turned against the executor, in favour of the accumulation.—Where equal sums are given in two *distinct* writings, or a larger after a less, or a less after a larger, the latter gift is construed an accumulation.

But though the presumption in a case, wherein two legacies of the same sum or quantity occur in distinct instruments, leans against the executor, yet it is only a presumption *simpliciter*, and is turned the other way where the same cause is expressly assigned in both instruments for the gift without any additional reason <sup>f</sup>.

And it seems also, according to Lord Hardwicke <sup>g</sup>,

<sup>f</sup> Menochius de præsumptionibus, lib. præ. 128, num. 4, 13, 14, and see Swinb. part 7, c. 20, fol. edit. 550.

<sup>g</sup> 2 Atk. 640.

that where, in a distinct instrument a *larger* legacy is given to the same person, assigning, in *totidem verbis*, and with a perfect identity, the same cause which was expressed in the former instrument, this shall not be a double legacy ; with which position, Aston J. in *Hooley v. Hatton*, appears to agree, and the same doctrine seems to be held by Lord Thurlow, in *Ridges v. Morrison* above cited, and is stated to be the rule by *Menochius*<sup>b</sup>.

It is to be remarked, that in the above-mentioned case of *Hooley v. Hatton*, which is a very leading authority, no idea appears to have been entertained of the admissibility of parol evidence. Mr. J. Aston opened with observing, that as in the case before him, there was no *internal* evidence, therefore, he must refer to the general rule of law. And the Lord C. B. Smythe observed, “ the intention is the clearest rule ; but it is admitted on all hands, here is no *internal* evidence, we must therefore refer to the rule of law.” And lastly, by the Lord Chancellor Bathurst, it was said, that “ no argument could be drawn in the case before him from internal evidence, they must, therefore, refer to the rule of law.”

Whether  
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dence is ad-  
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determine  
this ques-  
tion?

What Lord Thurlow's opinion was, as to the admissibility of parol evidence, does not expressly appear in the above-mentioned case of *Ridges v. Morrison*, but it is to be observed, that in illustrating his remark, “ that slight circumstances may operate in proof of the testator's intention,” he specified such only as could be collected from the context of

<sup>b</sup> Lib. 4, præ. 128, and see *Swinb.* 4to edit. 201. See also the recent case of *Benyon v. Benyon*, 17 *Vez. Jun.* 34.

the instruments. And in *Campbell v. the Earl of Radnor*<sup>1</sup>, the decision turned upon the words of the instruments. But in *Coote v. Boyd*<sup>2</sup>, the point respecting parol evidence came directly under adjudication, in which Lord Thurlow laid down the rule thus, "the question, whether by giving two legacies, the testator did not intend the legatee to take both, is a question of presumption *donec probetur in contrarium*, and will let in *all sorts* of evidence." And the same Chancellor further observed, (what the temper of later decisions seems inclined to adopt, as the true and practicable distinction) that "*where the question arises upon the construction of words simply, qua words, no evidence (i. e. extrinsic evidence) can be admitted.*"

Whether his Lordship would have been ultimately governed by these maxims, if the decision of the case had depended upon it, cannot be known, since the case was determined upon the *internal* evidence of the will and codicil themselves. It was much contended, that it was a case of presumption, and that *all* presumptions were open to be encountered by parol evidence.

<sup>1</sup> 1 Bro. C. R. 271.

<sup>2</sup> 2 Bro. C. R. 521.

## SECTION IV.

*Ambiguities.*

THE instance most frequently chosen as the example of the *ambiguitas latens*, is that of a devise to a person of the same name with another, without any specific description appearing upon the face of the will, to designate the real object of the testator's bounty\*. The case put by Lord Hobart, was that of a devise by a testator to his son John, having two sons of that name; and the same Judge having a little above decisively declared, that a testator's intent must be expressed in a will written, that it may be certain to the Court, observed on the case just put, that an averment might make this, *i. e.* who was designed by the testator, certain. The case and the comment contain together a true description of the *ambiguitas latens*, to constitute which there ought to be a positiveness and certainty of verbal expression becoming ambiguous in sense by the discovery of a matter not appearing in the instrument. This is the ambiguity latent, which, as it is created by facts, so it is removeable by a further investigation of facts.

A husband devised to his wife 700*l.* East India Stock, having no East India Stock; but he had 700*l.* Bank Stock; and the words were held to carry the

\* See 5 Rep. 68. Lord Cheyney's case. Hob. 32. Counden v. Clark, 3d point, and 1 Salk. 7. Lepcot v. Brown.



Bank Stock, it being only an error in description <sup>b</sup>. Lord Hardwicke said it was only error demonstrationis, and was no more than the devise of a black, where the testator had only a white horse. Thus also, where A. devised to J. S. those his lands, in B., in the county of S., in the possession of D. A. had no lands in that county, but had lands in B., in the county of H., in the possession of D. It was held that the lands in the county of H. passed by this devise <sup>c</sup>. Upon the same principle it has been held that where one devised all his freehold houses in A., having none there but leasehold, the leasehold should pass <sup>d</sup>. But though a testator may have mistaken his property, it does not follow that a disposition, made under such mistaken impression, shall not have its literal effect. Thus, where a testatrix, reciting that she was possessed of 12,700*l.* 3 per cent. consolidated Bank Annuities, standing in her name, gave and bequeathed the same, or so much of such Bank Annuities as should be standing in her name, at her death; and at the date of her will and at her death she had near 15,000*l.* in that fund, only the 12,700*l.* was held to pass; the recital being considered as involving the reason of the disposition <sup>e</sup>.

Of mistakes in the names of persons.

The names of persons appointed to take, under wills <sup>f</sup>, have been set right by parol evidence, where both the christian and surname have been mistaken. In such case, no words are *supplied* or *substituted*, but the mistaken appellation in the instrument is ap-

<sup>b</sup> 1 Vez. 255, *Door v. Geary*.

<sup>c</sup> 1 Ld. Raym. 728.

<sup>d</sup> 1 P. Wms. 286, *Addis v. Clement*, 2 P. Wms. 456. 2 Atk. 451. Cro. Car. 493.

<sup>e</sup> 15 Vez. Jun. 319. *Hotham v. Sutton*.

<sup>f</sup> And see *Hodgson and Caldecot v. Fitch and An'*. 2 Vern. 593.

plied to the person really intended by it, and the names of persons having no intrinsic meaning, the will is rectified without any alteration of the sense.

There may be a distinction, indeed, between such mistaken use of a name, which, though a wrong appellation of the object of the testator's bounty, happens to belong to an existing person within the testator's knowledge and possible contemplation, and that of a name under which there is nobody<sup>c</sup> to claim, as coming within its literal description. Thus in *Beaumont v. Fell*<sup>b</sup>, where the point arose upon a bequest in a will to Catherine Earnley, and the name of a person who claimed a legacy as the real object intended to be benefited was Gertrude Yardley, it was first shewn by her, and admitted, that no person called Catherine Earnley claimed the legacy, and then evidence was offered to shew that the scrivener, who took instructions for drawing the will, had made the mistake. The court established the claim of Gertrude Yardley, (1), but not without observing how very material it was to the case that no such person as Catherine Earnley claimed the legacy (2).

**Name mistaken, where the name used happens to belong to a person in being, and who might be in the testator's contemplation.**

<sup>c</sup> Rivers's case, 1 Atk. 410.

<sup>b</sup> 2 P. Wms. 141.

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(1) *Edge v. Salisbury*, Amb. 71. *Gines v. Kemsley*, 1 Freem. 293. *Dorset v. Sweet*, 1 Amb. 175. *Parsons v. Parsons*, 1 Vez. Jun. 266. and see particularly the case of *Del Mare v. Rebello*, 3 Bro. C. R. 246.

(2) In the case of *Del Mare v. Rebello*, 3 Bro. C. R. 246. the devise was to the children of the testator's sisters, Estrella and Reyna; Estrella had children, Reyna had none, and had changed her name and become a nun professed. But the testator had a third sister, Rebecca, who had children. The Chancellor would not substitute the name of Rebecca for Reyna.

What ambiguity is created by devise to a person's family.

On the other hand, the Court of King's Bench treated the case of Doe on the demise of Hayter v. Joinville<sup>1</sup>, as affording an instance of an incurable ambiguity. A testator having devised to his wife's *family* one moiety of his residuary property, and to his brother's and sister's *family* the other moiety, died, leaving a brother and sister living, and both with a numerous issue, as well as the children of a deceased sister. It was judged impossible to construe the will with any rational certainty, so as to make a precise application of the word *family*. And this was a proper example of the ambiguity patent, as the uncertainty was considered as inherent in the term itself, which, unless the context of the will had defined its applicability, could scarcely receive explanation from any extrinsic circumstances (3). Again, where a testator devises to 'one of the sons of J. S.<sup>k</sup>' who has many sons, no regard can be paid to any thing extraneous to the will, as the medium of expounding the testator's intention (4).

<sup>1</sup> 3 East Rep. 172.

<sup>2</sup> 2 Vern. 625. Amb. 175. 2 Mod. Cas. in Law and Equity, 122.

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(3) But it has since been held in the Court of Chancery, that the word 'family' imports as definite an object of a devise as the word 'relations,' in respect to which that Court has, upon grounds of convenience, adopted the rule of the statute of distributions; so that it seems a bequest to the 'family' of another person, after the decease of such person, will be executed by the court in favour of his nearest of kin. *Crewys v. Colman*, 4 Vez. Jun. 319. and see post. the note in page 35, et seq.

(4) It has been before observed, that where a testator gives the same legacy in different parts of his will to the same persons, it is an ambiguity which, unless helped out by some rule of construction, no extrinsic evidence can be received to explain. As to the

It is true, in the last instance, the ambiguity does not fully appear, till from the words of the instrument the attention is directed to the predicament of the object to which the words apply, since, if in point of fact there was but one son, that son would be entitled; but still it is obvious, that the reference to external facts (if there were more sons than one) would confirm the patent ambiguity, already attaching upon the words which in themselves express uncertainty, and which suppose a plurality of individuals equally included within the *terms* of a gift intended for one only, and therefore present an ambiguity in the very face of the will (5).

existence of any and what rule of construction in this case, there has been a great contrariety of opinion. See 2 Atk. 373. 3 Atk. 493. Plowd. Comm. English edit. 541, margin, where all the authorities are collected.

(5) I have transcribed the following note from Edward Altham's case, 8 Rep. 155, as furnishing several examples illustrative of the part of the subject above treated: "If A. levies a fine to William his son, to have and to hold to him and his heirs; upon this fine the Judge cannot make a question of any matter of law; but now the party comes and avers in fact, and says, that A. had two sons, named William, an elder and a younger, and that his intent was to levy the fine to William the younger; this averment out of the fine is good of this matter of fact, *which well stands with the words of the fine*, and shall be tried by the country. But if a man by deed gives goods to one of the sons of J. S. who has divers sons, here it shall not be averred which son was intended; for by *judgment in law* upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment. So if a man levies a fine of the manor of S. or of the manor of D. to two *et hæredibus*, and in truth there is the manor of North S. and South S. or Great D. and Little D. in this case issue may be taken *dehors*, *which manor the conusor intended to pass*, for that is matter of fact, not apparent in the fine, whereof the judge cannot take conusance; but it *stands well* with

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biguity.

If the ambiguity occurs in the wording of a will, producing a palpable uncertainty on the face of it, extrinsic evidence cannot remove the difficulty, without putting new words into the mouth of the testator, and, in effect, making a will for him. But if a will presents no ambiguity independently of facts, the un-

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the fine, and shall be tried by the jury. But where the words whereby the estate is limited are to two *et hæredibus*, that is apparent in the fine, and, by judgment of law, these words *et hæredibus* are uncertain and void, and no averment *dehors* can make that good which upon consideration of the deed is *apparent* to be void." Sometimes, however, there is a natural way of explaining the ambiguity by resolving it into a mistake. 1 Vez. 560. As where a testatrix gave and bequeathed unto *the two* servants that should live with her at the time of her death 100*l.* new South Sea stock to be equally divided between them, and in fact, though the testatrix had but two servants at the time of making the will, yet she afterwards took a third who lived with her at the time of her death. The Master of the Rolls, Sir Thomas Clarke, held that all the three servants should share equally; and his Honour added that if a testator had four servants and said, "I give to all the three servants living with me at my death," he thought all the four would be entitled to a share, and that the indefinite word *all* would have warranted the court in rejecting the word *three* as repugnant. The ground of this construction was the maxim of "*ut res magis valeat quam pereat*," for otherwise the bequest would be void for uncertainty. His Honour also cited a case of *Tomkins v. Tomkins* in 1745, where a testator gave to his sister 50*l.* and to her three children 50*l.* each, and in fact there were four children of the sister, the Chancellor was of opinion, that the words were indefinite, notwithstanding the word *three*, and were intended to take in all the sister's children. In *Ongly v. Peed*, 10 Mod. 103. where a man devised his land to A. and his brothers successive, and A. was by the verdict found to be the elder brother, the court were of opinion, that the will was good and certain enough; for being in the case of brothers the common law was a guide to the exposition of the word *successive*, viz. that the eldest should enjoy it first for his life, then the second, and then

certainty which arises must come from behind the instrument, and is in this consideration of the phrase with propriety called a *latent* ambiguity: and indeed to a certain extent extraneous evidence must be resorted to in establishing the title under any devise, since, let the words be ever so clear, the person designed can only bring himself within the description *in foro contentioso*, by proof of his identity.

The late Chief Justice of the King's Bench, in the case of *Thomas v. Thomas*, 6 T. R. 676, makes this observation: "It has been a long established rule, that where there is a latent ambiguity in a will, the parties may go into extrinsic evidence to render that certain, which, without the aid of such evidence, is uncertain; but here the evidence has itself raised the ambiguity; on the face of the will there is no uncertainty." This passage seems to imply, that where there is no uncertainty on the face of a will, but the evidence *raises* the ambiguity, the case is incurable. Possibly, however, his Lordship did not mean to be so understood, since there would be tautology in the phrase of *latens ambiguitas*, unless it imported an ambiguity not existing on the face of the instrument, but lying behind in the dubiousness of the objects to which its provisions were directed, and therefore capable only of being explained by reference to those objects through the medium of external evidence.

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the third: especially when he who was first named in the will was by the verdict found to be the eldest brother. Had the devise been to A. B. and C. to take successively, it would have been void for uncertainty.

The truth will be found upon consideration to be, that the state of facts *raises* the *latent* ambiguity<sup>1</sup>, and may also *dissolve* it; but the *patent* ambiguity consists in the uncertainty of the language used, or in the vagueness of description or expression, and can be expounded only by the context and general sense of the instrument. *Thomas v. Thomas*<sup>2</sup>, above referred to, was a case of the *ambiguitas latens*, wherein the words of the will comprised a clear and certain description, but the parol or extrinsic evidence raised the doubts respecting the intention of the testator. The state of facts in that case created the latent ambiguity; which facts were shortly these:

The testator devised lands to Mary Thomas, his grand-daughter, of Llechlloyd, in Merthyr parish, and it turned out in fact that the testator, at the time of his death, had a grand-daughter, of the name of Elinor Evans, who lived at Llechlloyd, in Merthyr parish, and a great-grand-daughter, Mary Thomas, an infant, of the age of two years, the only person of that name in the family; but it appeared that she lived at Green Castle, in the parish of Llangain, at the distance of some miles from Merthyr, in which place she had never been.

Here there was a person in existence to answer to the name in the devise; but she was neither the grand-daughter, nor living at Llechlloyd, in Merthyr parish; and there was another person, a grand-daughter, who was of Llechlloyd, in Merthyr parish, but to whom the *name* did not apply. The

<sup>1</sup> 1 Bro. 85.

<sup>2</sup> 6 T. R. 676.

judge at nisi prius received the evidence (subject to the opinion of the Court as to its admissibility) to shew that the name of Mary Thomas was inserted by mistake for that of Elinor Evans; but the jury were not persuaded by it, so that the admissibility of that evidence did not come to be judicially decided. The contest between these claimants, to neither of whom the words of the disposition corresponded, opened the way by the uncertainty appearing on the parol evidence, for the title of the heir at law.

After it had been found that there was no mistake in the name, the question of course lay wholly between Mary Thomas, and the heir at law; or, in other words, the only consideration which remained was, whether the description was applicable, with sufficient certainty, to entitle her as the object of the disposition; in which shape of the contest the distinction which has been above shewn to have been taken in *Beaumont v. Bell*", in favour of those cases of defective dispositions, where the person intended was clearly perceived through the mistake, and no person was in existence to claim under the erroneous description, became very important; for though the jury had disallowed the pretensions of Elinor Evans, the court thought that in as much as the description both of place and relationship was applicable to her, such a degree of uncertainty as to the person intended was thereby introduced as was sufficient to exclude the application of the maxim of *falsa demonstratio non nocet*; for that rule will only apply *si constat de per-*



*sona* (6). And therefore, as Elinor Evans could not take because nothing but the description or *demonstratio* belonged to her, and there was a person in existence and claiming, to whom the name applied; so neither was Mary Thomas suffered to take under the devise, because nothing but the name applied to her, and the description both as to place and kindred was precisely appropriate to another person in existence and contending for the preference on these grounds (7).

Of the effects of a false or true description.

It is to be observed, that neither the christian nor surname of Elinor Evans agreed with the name in the will; but where the mistake has been only in the christian name, and the instrument has contained a full and exact description of the person so *imperfectly* designated by *name*, although there has existed another person *wholly* answering to the name in *both* particulars, the particularity of the *description* has outweighed the advantage on the other side arising

(6) But a true description will assist a wrong name, if there is no other person of the name. 2 Vez. 217. And if there is a *certain* description, and a further description is added, it is immaterial whether the superadded description be true or false. See *Bradwin v. Harpur*, Amb. 375. Which case presents an instance of a transposition of parties, the legacy intended for one being given to the other by a very evident mistake of the names. See this subject ably commented upon in *Doe on dem. Harris v. Greathead*, 8 East, 91. see also 8 East, 149.

(7) In this case, the first ambiguity was *ambiguitas latens*, for it only appeared by reference to outward circumstances; but though extrinsic circumstances produced the ambiguity, they offered no media for its explanation; and this is the proper description of an incurable latent ambiguity.

from the coincidence in both the christian and surnames. As where the devise was to the Rev. Charles Smith, of Stapleford Tawney in the county of Essex, clerk, and the legacy was claimed by the Rev. *Richard* Smith, of Stapleford Tawney, in the county of Essex, clerk. It was contended that one Charles Smith, an officer in the army, who had lived at Rumford in Essex, and had been dead some time, was intended, and that so the legacy had lapsed; but it was proved by the widow of Charles Smith, that he died before the testatrix made her will; and upon the court's manifesting a decided opinion against the executor and trustee of the residuary legatee, the point was given up, and a decree was made for the legacy, with interest, but without costs, in favour of the plaintiff, the Rev. Richard Smith (8).

The result seems to be, that wherever an ambiguity arises from the inapplicability of the name or description, as such ambiguity is produced by the state of facts, it is open to explanation by parol evidence, being properly an example of the *latens ambiguitas*; but still the evidence, when let in, may increase instead of lessening the degree of uncertainty, or it may fall short of affording that degree of inference, which is requisite to decide the court or the jury.

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(8) 6 Vez. Jun. 42. *Smith v. Coney*. So in *Parsons v. Parsons*, 1 Vez. Jun. 266. and in *Garth v. Meyrick*, 1 Bro. C. R. 30. circumstances weighed in favour of a person imperfectly named against another person to whom the name belonged, but who clearly appeared not to be the person intended, when the circumstances of description, and the facts coming in upon parol evidence, were coupled together.

Of the effect of a blank left for the name of a legatee.

Thus much as to mistakes in the names and descriptions of persons, by which it appears, that very wide deviations and mistakes have been corrected by parol and extrinsic evidence. But when a *blank* is left for the name of a legatee or devisee, it is too much to set up an object of the testator's bounty, by any description of evidence. Thus in the case of *Hunt v. Hort* (9), where the testatrix directed that her other pictures (having made some previous specific bequests of pictures), should become the property of Lady —, the Chancellor said he could not supply a blank by parol evidence; though there certainly were some strong circumstances in the will itself, to shew that Lady Hort was the person intended. But where there was a blank only left for the christian name, evidence was without difficulty read to shew the testator's intentions, with regard to the person answering to the surname\*. And two initials of the person to whom a legacy is given, have been filled up by parol evidence of the person intended (10).

Some ambiguities *patent* are not incurable.

It must be allowed, that, in the last instance, the rule of admitting parol evidence in the case of an

\* Price v. Page, 4 Vez. Jun. 680.

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(9) 3 Bro. C. R. 311.; and the same point was adjudged in *Baylis and Church v. the Attorney General*, 2 Atk. 239.; and again in *Castledon v. Turner*, 3 Atk. 257.: and see *Pym v. Blackburn*, 3 Vez. Jun. 457.

(10) *Abbott v. Massie*, 4 Vez. Jun. 148.; and where a will is hardly legible, and the legacies are in figures, the court will refer it to the Master to examine what the legacies were. So where a legatee's name was falsely spelt, it was referred to a Master to see who was intended. 1 P. Wms. 425.

ambiguity latent, and rejecting it when offered to expound an ambiguity patent, becomes a little unsteady. Where a testator gives a legacy to Mrs. G. it is not easy to shew that the ambiguity which this imperfect designation creates is not an ambiguity arising upon the face of the will, and, as such, an ambiguity *patent*.

Perhaps we must allow that the rule is flexible to the extent of admitting extrinsic evidence in a few particular cases, where the ambiguity, though *patent*, arises from something short in the expression or designation of the objects of the testator's intention, and is of a nature calculated to receive an easy explanation from outward facts.

So in other cases, although the effect of a positive clause<sup>p</sup>, is not to be controuled by inference from other parts of the instrument; yet if matter can be collected from the general context of the instrument, the *approach* to an ambiguity patent in a *particular* clause or sentence, will not exclude the admission of parol evidence, provided it tends to confirm this collective inference from the context. Indeed, *that* can scarcely be termed an ambiguity, which is capable of an exposition from other parts, or from the bearing and scope, of the instrument. And it is generally true, that where the context of the instrument reflects light upon an ambiguous passage, but not strong enough to decide the exposition with sufficient certainty, it may nevertheless afford a ground for the admission of extrinsic evidence. Perhaps, too, we may go a step further, and say, that where

Of the lights reflected upon particular passages by the context.

<sup>p</sup> Jones v. Colbeck, 8 Vez. Jun. 42.

such secondary grounds of construction are morally decisive, as may sometimes be the case, it may be doubted, whether any extrinsic evidence can be received to contradict it ; for instruments are not to be construed piecemeal, but illustration is to be borrowed<sup>\*</sup> from all the parts of them, to give light to particular passages.

In *Ulrick v. Litchfield*<sup>\*</sup>, the ambiguity was also upon the *face* of the instrument, but there was a bearing in the language of the will that assisted the sense ; parol evidence was therefore, as it seems, very consistently and properly admitted, to decide the preponderance. The devise in *Castledon v. Turner*<sup>\*</sup>, upon which the question arose, was considered as receiving illustration from the other parts of the will, and from a natural order of preference, inferrible both from the instrument itself, and from the relation of the persons concerned ; so that the particular uncertainty was expounded by a comparison with the general tenour and object of the will ; yet the Lord Chancellor seemed to hold, that as it was a case in which there was an absolute omission of a devisee, no extrinsic evidence could be admitted. But the case, as it was regarded by his Lordship, did not stand in need of it, there being enough in the will for its own exposition. The point of the case was this :—W. bequeathed his lands to his wife for her life, and after her decease, to M. D. the niece of his wife, and proceeded thus : “ Item, I give the use of 500*l.* stock for *her* natural life, but after *her* decease, I give the 500*l.* among my wife’s brothers and sis-

<sup>\*</sup> See *Coker v. Guy*, 2 Bos. et Pull. 565.

<sup>\*</sup> 2 Atk. 372.

<sup>\*</sup> 3 Atk. 257.

ters." Lord Hardwicke considered this as a case of the absolute omission of a devisee, and nearly the same as where a blank is left for the name of the devisee, in which case parol evidence is always excluded.

Upon the whole it appears that whatever doubts may exist, whether in *any* case of a palpable ambiguity *patent*, any help can be borrowed from mere parol evidence, consisting of *words* and *declarations*; yet it seems to be settled in practice, that if the court can, from the lights furnished by the instrument itself, gain some foundation of conjectural inference, they will look out of the instrument itself to the situation of the parties or persons concerned (11). *Masters v. Masters* (12), was a strong case decided on this principle. There a testatrix gave a sum of money *to all and every the hospitals*, without saying where the hospitals intended by her were; but because it appeared that the testatrix lived at

The courts will sometimes look out of the instrument, and infer the intention from the situation of the person or property.

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(11) In the case of *Crone v. Odell*, Ball and Beatty's Reports of Cases in the Court of Chancery in Ireland, page 449. we find Lord Chancellor Manners thus expressing himself on this point: "An argument has been urged by the counsel for the defendant (with a view to exclude the consideration of the state of the testator's family), that the court cannot travel out of the will for that purpose. The contrary, however, has been held to be law from the time of *Wild's case*, 1 Rep. 16. to the present time. In *Goodinge v. Goodinge*, 1 Vez. 231. the same argument was urged, and over-ruled by Lord Hardwicke; and his opinion on that point has been confirmed by the uniform decisions of courts of equity ever since.

(12) 1 P. Wms. 423. It appears also by this case, that a blank left in a codicil may sometimes be supplied from the will.

Canterbury, and moreover, that she took notice by her will of two Canterbury hospitals ; the devise was held not to be void for uncertainty, but to have been intended for all the hospitals of Canterbury.

The same practice of looking out of an instrument to the situation of the parties concerned, for collecting inferences of intention, appears in the case of *Harris v. the Bishop of London*\*, which was thus : Talbot Barker being seised in fee of a real estate, as heir on the part of his mother's mother, and being also seised in fee of a very small estate of *4l. per annum*, as heir of his own father, devised all these lands to trustees and their heirs, in trust to pay several annuities and charities ; after payment of which, he devised the residue of the rents and profits of the premises to his own right heirs of his mother's side, for ever : and the question was, who should be entitled to the residue of the rents and profits ; whether the heir of the mother's father, or the heir of the mother's mother. Here the court looked *beyond* the will to the testator's title to the property devised, and finding it to be derived through the mother's mother, decreed it to go the heirs of the testator on the part of his mother's mother.

This will perhaps appear, when properly considered, a stronger case than that of *Masters and Masters* ; for although the extraneous matter was not introduced to explain an ambiguity patent, since in the words of the will there was no ambiguity at all ; yet it was certainly resorted to by Lord Macclesfield, to annex a meaning to words beyond their legal effect ;

the "right heirs of the mother's side," being a description properly applicable, in the first place, to the heir of the mother's father; nevertheless, as we have seen, the court gave the estate to the heir of the mother's mother, in deference to the argument drawn from the manner in which the estate had in fact devolved to the testator. And it is to be further noted, that in this case the Chancellor did not look out of the will to the title to the property (13) for the sake of deciding the judgment already inclined the same way by the context of the instrument, for it does not seem that the will afforded any internal evidence.

But the want of this internal evidence in the will itself, to justify the resort in the last-mentioned case to the external facts, makes the propriety of that decision at least *questionable*, if we regard the authorities on this head; and, perhaps, the consistency of legal principles was better consulted by the firmness of the decision of Lord Talbot, in the case of *Brown v. Selwyn*<sup>u</sup>, which was shortly as follows: John Brown made his will, and after several dispositions of real and personal property, devised as follows: "And as to the rest, residue, and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways en-

<sup>u</sup> Cas. Temp. Lord Talbot, 240.; and see 4 Bro. P. C. 179.

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(13) There are numerous cases where the descriptive force of words have been decided by reference to the circumstances of the property; as where words inapplicable in their proper sense to leaseholds or copyholds, have been held to include them out of regard to the actual situation of the testator's property. See these cases, *ante*, Vol. I. ch. 4.



titled to, I give and bequeath the same, and every part thereof, and all my right, title, and interest therein and thereto, unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, his or their heirs, executors, administrators, and assigns, as tenants in common, and not as joint-tenants." And the testator afterwards appointed the plaintiff and defendant his executors, and died, and the plaintiff and defendant both proved the will. The defendant was, at the time of the testator's death, indebted to him in 3000*l.* and for securing thereof, had given a bond to the testator (14). The prayer of the bill was, that the defendant might account with the plaintiff for the testator's residuary property, and pay to him a moiety of the said sum of 3000*l.* with interest, and the cross bill was brought up to have the bond delivered up to be cancelled. It appeared by the answer of the defendant in the original cause, and by the proofs (15), that the testator really designed to give this money

In equity a debt is not released by the creditor's making his debtor his executor.

(14) In equity, a debt is not released by a creditor's making his debtor his executor; but at law it is otherwise; and if a creditor makes his debtor *and another* his executors, the consequence at law is still the same; nor is this consequence varied by the fact of the debtor's administering, or not administering; the reason whereof is this, that the other cannot bring an action without joining him who refuses, and they cannot sue one of themselves for a personal thing. See this doctrine well treated of, in Plowd. Comm. 184. *Woodward v. Lord Darcey*.

(15) In courts of equity, these parol proofs are generally permitted to be read without prejudice. But at law, where the jury might, and probably would be, influenced, by the admission of such improper testimony, the production of it will not be allowed. See this distinction adverted to by Mr. Justice Powell, in *Newton v. Preston*, Prec. in Ch. 104.

to the defendant, and that he had actually instructed one Viner, the attorney who drew the will, to make this disposition accordingly ; that Viner neglected to make mention of it in the will, insisting that the bond would be extinguished and released, of course, by Selwyn's being appointed executor ; but that the testator appearing dissatisfied with Viner's opinion, a case was laid before counsel, who confirmed what Viner had said, relying upon which, the testator signed and published his will, with a full persuasion that the bond would be extinguished ; and this appeared clearly to have been the intention of the testator.

It was impossible for parol evidence to be more decisive than that which was offered in this case, if it could have been received ; but it is equally plain, that if the will were considered without the parol evidence, and the general devising words giving all the real and personal property, not before disposed of, to the residuary legatees, were only attended to, that this debt was included in the bequest, as falling under the description of personal estate. The Chancellor, although he declared it to be his private opinion that the debt was intended to be released to the executor, by whom it was owing, thought himself not at liberty to yield to the parol evidence, and to make a construction against the plain words of the will.

Although the case of *Brown v. Selwyn*, is not easily reconcileable with that of *Harris v. the Bishop of London*, yet it is not opposed to the doctrine of the admissibility of parol and extrinsic evidence, to decide the judgment already strongly inclined by

the context and external evidence of the instrument.

We may safely say that there is no rule which stands on a surer principle than this—that parol evidence is never to be admitted where there is no ambiguity to call for explanation, and where the will may operate according to the words without any such foreign help. If, on the other hand, there is no subject on which the words in their ordinary and received sense can operate, extrinsic evidence may be called in. But an intention in the testator beyond the natural meaning of the expressions used, is never to be gratuitously inferred. Thus in a late case in the Common Pleas, where there was an estate sufficient to satisfy the devise according to the proper meaning of the description of the premises, collateral evidence was held not admissible to shew that the testator meant to use the description in a more extensive sense. In that case the devise was of “all my estate of Ashton.” The testator had an estate from the mother’s side, and also a paternal estate. His maternal estate comprehended a manor, capital farm, and lands in the parish of Ashton, as well as several other estates, some in an adjoining parish, and some in parishes at the distance of ten or fifteen miles from Ashton. It was attempted to be shewn that the testator was always accustomed to call his maternal property his ‘Ashton estate,’ to raise the inference that he intended to devise the whole of his maternal estate by the name of his ‘estate of Ashton;’ but the court refused the evidence\*.

\* Doe d. Sir Arthur Chichester, Bart. v. Oxenden, 3 Taunt. 147.

## SECTION V.

*Rules of construction not to be opposed by extrinsic evidence.*

UPON the whole, the distinction, according to Lord Thurlow, seems to be this: that *all sorts* of evidence are admissible, with different degrees of weight and value, to rebut presumptions of equity (1), and even that constructive operation of an instrument which is referrible to presumption; but that where the question arises upon the construction of words, *qua* words, no extrinsic evidence can be admitted; still less can it be received to controul a technical rule of verbal construction (2).

There are some equities arising upon written instruments, the strict and technical nature of which seems to place them clearly out of the reach of parol

Some equitable rules too strict to depend upon evidence of intention.

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(1) It has long been fully settled, that parol evidence is admissible to rebut a resulting use, *Lord Altham v. the Earl of Anglesea*, 2 Salk. 676. see also *Roe, lessee of Roach v. Popham and others*, Dougl. 2.

(2) When certain words have received a certain technical construction, we must abide by the decisions in construing such words, otherwise we shall be removing land-marks, by *Kenyon C. J. and Lawrence*, J. 6 T. R. 354.

evidence ; by which are meant those which do not arise out of the presumable intention, or the moral and conscientious relations of parties ; but out of an artificial system of jurisprudence, the maxims of which can be neither steady nor clear unless pursued to their consequences, and kept uniform in their application. This observation holds especially with respect to the rules which govern the succession to property ; to which some equitable canons apply of a merely *positive* nature, and which are grounded on accident and habit, rather than principle or presumption. Such appears to be the rule which favours the real representative, by applying the personal estate in exoneration of the land, though *expressly* charged by the testator—a rule derived to us from the ancient policy of our ancestors, which has impressed on the law of landed property, its inveterate preferences in favour of the heir, whom it was anxious to qualify with the means of sustaining the duties of the feudal relation. Though it may be observed that the abolition of the feudal tenures, and the growing interests of commerce, have made the courts very ready to take cases out of a rule, which is considered as not agreeable to the situation of the times ; still, however, it is left standing, and though living in dishonour, is of general obligation in courts of equity.

So too, the rules which apply to and modify the titles to real and personal property, (wherein the courts of equity hold a perfect agreement with courts of law), as, for example, such as concern the rights of representation and administration, the quantity of estates expressed by certain legal idioms, the compass and effect of limitations, and the descriptive

force of technical expressions (3), are not to be shaken by extrinsic evidence. Thus, that rule of construction which makes void a remainder of personal estate, limited upon a prior gift or assignment of the same to a man and the heirs of his body, and

Examples of rules of construction not to be opposed by extrinsic evidence.

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(3) That parol evidence cannot be admitted to contradict such legal signification and compass of words, see *Kelly v. Paulett*, Amb. 605. The sense of words as fixed by legal authority, is not to be altered by external proofs of contrary intention. Thus, for example, the sense and scope of the word *Relations*, where there is a devise to persons by that general name, without any words of more specific designation, have been adjusted to the statute of distributions in courts of equity, and adjudged to comprehend only the nearest of kin, to the extent of the degrees within that statute; and extrinsic evidence will not be let in to shew that a greater or less compass was intended to be given to the word by the testator; vide *Whithorne v. Harris*, 2 Vez. 527. *Roach v. Hammond*, Prec. in Chan. 401. *Harding v. Glyn*, 1 Atk. 468. *Green v. Howard*, 1 Bro. C. R. 31.

Of the rule in construing a bequest to relations.

It may be useful as the point has occurred, to collect for the reader the decisions upon it, which are rather curious.

The construction does not render the will inofficious and nugatory, since the wife is excluded, not being within the meaning of the next of kin, but provided for by the statute by the name of wife. The statute of distributions marks the distinction between the next of kin and the widow. And the ordinary legal sense of the next of kin is never held to include the wife. Thus where a man devised his residue to be divided among his next of kin, as if he had died intestate, the words "as if he had died intestate," were rejected as surplusage, and the next of kin by blood only were held intitled under the will, *Garrick v. Lord Camden*, *Pattton v. Jones*, 14 Vez. Jun. 372. So the marital right of the husband as administrator by law, is excluded by a limitation to the next of kin of the wife. *Anderson v. Dawson*, 15 Vez. Jun. 537. Neither is it without effect, though the persons to take under this construction be the same and only such as would take under the statute, for still their *shares* may be different; as if a testator di-

vests the absolute and ultimate interest in the first grantee or devisee, cannot be opposed by parol evidence. Accordingly in *Stratton v. Payne*\*, where the testator devised his personal as well as real estate to A. P. and the heirs of her body, with a limitation

\* 3 Bro. P. C. 257.

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rects a sum to be equally divided among his relations, it must go to them *per capita*, and not *per stirpes*, see *Thomas v. Hoole*, Cas. Temp. Talbot, 251. *Philips v. Garth*, 3 Bro. C. R. 64. *Butler v. Stratton*, 3 Bro. C. R. 367. The rule of division is the same also where the bequest is to the next of kin, and there are brothers and brother's children. Though it is to be observed that under a bequest to the next of kin in *equal degree* if brothers or sisters are living, they will take in exclusion of the child or children of a deceased brother or sister. *Wimbles v. Pitcher*, 12 Vez. Jun. 433. If a legacy be given to the *descendants* of A. and B., equally, children and grandchildren take *per capita*. *Northey v. Strange*, 1 P. Wms. 342. and *Blackler v. Webb*, 2 P. Wms. 383. But *Jones v. Beale*, 2 Vern. 381. which carried a bequest to *relations* to the children of a cousin-german, living the parent, cannot be law; for the statute does not carry the representation among collaterals beyond the children of brothers and sisters.

At the conclusion of the case of *Maitland v. Adair*, 3 Vez. Jun. 232. we find a dictum of Lord C. Loughborough, that where a person bequeaths among his relations, those by affinity are not included. If however, the testator mark an intent to carry the word 'relations' beyond the extent of the statute, the court will effectuate the disposition, the statute being only adopted from necessity. But a legacy for a mourning ring to each of the testator's relations, by blood or marriage, was confined by the court to nearest of kin, according to the statute of distributions, and to those who had married persons entitled under it. See *Davison v. Mellish*, 5 Vez. Jun. 529. It has been held that an exclusive appointment, under a power of appointing to and among such of testator's relations as shall be living at the time of testator's death,

over in default of issue of A. P., the limitation over was adjudged void both by the Court of Chancery and the Lords, who concurred in rejecting parol evidence, (though it was the evidence of the person who drew the will), to shew an intention in the testator opposed to this construction.

Again, it is a rule of construction in courts, both of law and equity, that a devise to a man and his

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in such shares as the appointer shall please, is good, 1 T. R. 435. and where a trustee has the power of selecting, he may go beyond the statute of distributions, see *Crewys v. Coleman*, 9 Vez. Jun. 319. So where a person has a power of distribution among *poor* relations, he may distribute among all poor relations however remote : but wherever the court is called in to distribute, in failure of the person so empowered, it will confine itself to relations within the statute of distributions, *Mahon v. Savage*, 1 Ca. temp. Lord Redesdale, 111. and see *Spring ex dem. Titcher v. Biles*, 1 T. R. 435, note (f). If a testator give to his poor relations ; one who is poor at the time of the death, but becomes rich before distribution, seems not to be entitled ; and if a poor relation so entitled die before distribution, his claim is held not to be transmitted, *id.* It is to be observed, that as the property in these cases does not pass by virtue of the statute, (the court only taking it as their guide in ascertaining the persons to take), the shares and proportions are to be regulated according to the intent of the testator, *Brunsdon v. Woodridge*, Ambl. 507. *Butler v. Shalton*, 3 Bro. C. C. 367. and in the late case in the Common Pleas, of *Doe ex dem. Thwaites and others v. Over and others*, 1 Taunt. 263. the statute was adopted as the guide for ascertaining the relations, to satisfy that term in a will where the subject was real property.

The word *family* denotes as definite an object of a devise as the word *relations*, and shall be expounded in like manner, *Crewys v. Coleman*, 4 Vez. Jun. 319. and observe that under a disposition by will to A.'s and B.'s families, the children are entitled exclusively of their parents, *Barnes v. Patch*, 11 Vez. Jun. 604.



heirs and assigns, or a bequest to one and his executors, administrators and assigns, conveys no original interest to the representatives, but by transmission only, and that consequently the devise or legacy fails if the devisee or legatee die before the testator; and this construction, though it operates to destroy *pro tanto* the will, cannot be opposed by parol evidence of the testator's contrary intention as to the devisee; which point was decided so long ago as in the case of *Brett v. Rigden*, in *Plowden's Commentaries* (4) upon the statutes 32 and 34 H. VIII. of wills, (which, like that of the 29 Car II. require a will to be in writing;) where, the evidence offered of the testator's declaration of his bountiful intention towards the heir of the deceased devisee was rejected, as being in derogation of those statutes of H. 8.; and the same point in respect to a *legatee* under similar circumstances, may be seen in the case of *Maybank v. Brooks* <sup>b</sup>.

<sup>b</sup> 1 Bro. C. R. 84.

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(4) 345, 3d point, and see the case of *Doe dem. Turner v. Kett*, 4 T. R. 601. A. devised to B. and the heirs of her body, B. died in the life-time of A. A. by a codicil confirmed his will, held that the heir of B. took nothing, although it appeared that A. *knew of the death of B. and of the birth of her son before he made his codicil.*

## SECTION VI.

*Of the presumptive Trust in the Executor for the next of Kin of the Testator as to the Surplus undisposed of by the Will.*

AN executor, to whom a legacy is given, is generally, by the equitable presumption raised by that circumstance, deprived of the benefit of his legal title ; and becomes a trustee of the surplus, undisposed of by the will, for the nearest of kin to the testator ; which is a presumptive construction, arising out of the instrument itself, and resting on an implied exclusion from the whole, by a specific gift of part (1).

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(1) A similar question sometimes arises in the case of a devise of real property, where the estate is devised subject to various charges and partial dispositions of the rents and profits, but without any express disposition of the beneficial residue: viz. whether such residue is to remain with the devisee, or to become a resulting trust for the heir at law. This was the point in the late case of *King and Denison*, 1 Vez. and Beames 260. in which the court, collecting the intention from the whole of the will, construed it a beneficial devise, and not a resulting trust.

His Lordship observed, that the principles applicable to the case were well settled. He adopted those expressed in *Hill v. the Bishop of London*, 1 Atk. 618. as affording the grounds upon which Lord Hardwicke proceeded. The distinction, his Lordship said, upon which the court had gone, was this. If I give to A. and his heirs all my real estate, charged with my debts, this is a devise to him for a particular purpose, but not for that purpose

The question, as to the admissibility of evidence to rebut this presumption, will only properly arise where the legacy to the executor is accompanied by no particular words, denoting in a special manner, the intention of the testator ; for there may be cases,

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only. If the devise be upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. The former is a devise of the estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose ; the latter is a devise for a particular purpose, with no intention to give to the devisee the beneficial interest. This, he observed, was the meaning of the several passages in *Hill v. the Bishop of London*, and other cases before Lord Hardwicke, who marked the distinction that the word *trust* was not made use of. That was a circumstance to be attended to, but nothing more. If the whole frame of the will created a trust, for the particular purpose of satisfying which the estate was devised, the law was the same, although the word *trust* was not used.

The case just adverted to turned mainly upon the distinction between a direct trust and a charge, or a devise upon trust and a devise subject to a charge ; though in equity these objects are enforced in the same way. And it was considered by the court to be very clear that a devise, after a direction that all the debts should be paid, amounted only to a charge. This, then, was the ground of the decision, though the court gave some weight to the circumstance that the devisees were infants, and that it was difficult to consider an infant as intended to be a trustee ; and also to the fact that the heir took a benefit under the will. In general, however, a legacy to the heir has not been considered as sufficient to defeat his title to the real estate undisposed of. See *Kellett v. Kellett*, 1 Ball and Beatty, 543. And where the question was upon the construction, whether the real estate passed under the word *effects* in the residuary clause ; and there was nothing positive in the will to shew that real estate was intended to be included in the term ; the reversion in fee was held to descend to the heir, although he had a rent-charge devised to him for his life, out of the *same* estate. See *Camfield v. Gilbert*, 3 East, 516.

as *Rachfield v. Careless* (2), wherein the language whereby the legacy is given, may carry the presumption so high as to place it on a level with an explicit declaration, and above all parol proofs to the contrary. Mr. J. Powis, who sat for the Chancellor, in the last-mentioned case, declared his ge-

(2) 2 P. Wms. 157. in which case a legacy of 5*l.* was given to the executor for his care in fulfilling the will. Vide *May v. Lewin*, 2 P. Wms. 158. n. 1. and the numerous distinctions on this subject in Mr. Coxe's note to *Farrington v. Knightley*, 1 P. Wms. 549. and the cases in the note at the end of *Nisbett v. Murray*; see also *Abbott v. Abbott*, 6 Vez. Jun. 225. and the cases therein cited. From the whole of which it appears, that a legacy will not take away an executor's right to the surplus, unless such legacy is inconsistent with the supposition that he was meant to take the whole. But the executor is always excluded where the words of the will indicate an intention to impose a burthen rather than to confer a benefit, whether there be any legacy given to the executor or not. *Urquhart v. King*, 7 Vez. Jun. 225. *Selley v. Wood*, 10 Vez. Jun. 71. Where an executor had a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin. *Williams v. Jones*, 10 Vez. Jun. 77. And the Chancellor decreed to the infant the whole residue. In the case of *White and Evans*, both the executors had legacies, and the legacy to one was for his care and trouble, but no evidence was offered in favour of him whose legacy was not said to be for his care and trouble, 4 Vez. Jun. 21. Unequal legacies given to executors by their own names will not exclude them from the residue, 1 Bro. C. C. 328. and see *Griffiths v. Hamilton*, 12 Vez. Jun. 298. and *Rawlins v. Jennings*, 13 Vez. Jun. 39. A legacy to the next of kin does not exclude such next of kin from his title as such, 10 Vez. Jun. 74.

When a legacy takes away an executor's right to the surplus.

If a testator shews an intention to give the residue away from the executors, though the bequest fails the executor is excluded, as where the testator gives it in the manner he shall appoint, and he makes no appointment, or where a blank is left for the residuary devisees, the executors are not entitled. And a general bequest upon trusts, not sufficient to exhaust the whole property, raises a trust for

neral repugnance to admit parol evidence in opposition to this equity for the next of kin, and stated it to have been a *vexata questio*, on which there had been the greatest variety of opinion in all the tribunals in which it had been agitated.

It seems that in the earlier cases, the hesitation in

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the next of kin. If, however, a particular legacy lapses, or is void, it falls to executor where he is entitled to the surplus; for the rule is, that executors take the residue precisely in the same plight as a residuary legatee. *Dawson v. Clark*, 15 Vez. Jun. 409.

It is to be observed, that in the case of *Rachfield v. Careless*, evidence seems to have been admitted in favour of the next of kin, upon which Mr. Coxe remarks, that it appears to be the only case in which parol evidence has been admitted in favour of the next of kin. Nothing, indeed, is more obvious than the distinction between *raising* and *rebutting* a presumption or an equity, for the former of which objects, parol and extrinsic evidence can never, without great violation of principle, be admitted; but the equity ought first to be raised by the presumptive construction of the instrument, to which equity parol evidence may be opposed; and then I conceive it follows upon sound maxims both of law and equity, that parol evidence may likewise be adduced in opposition to this rebutting evidence, and in support of the original presumptive equity. And this, I apprehend, has always been the rule of proceeding; so that the observation of the learned editor just alluded to, must be understood as adverting only to the inadmissibility of parol evidence, in the first instance, and for the purpose of *raising* the equity for the nearest of kin, against the legal title. Indeed, the parol evidence, in the case last-mentioned, for the next of kin, seems to have been superfluous, since the presumption against the executor, from the particular language of the bequest to him, was so strong as to amount to a declaration by the will itself. The last case in the books upon this subject, is the case of *Langham v. Sandford*, 17 Vez. Jun. 435. which agrees with all that has before been said in this note, and though in that case the particular legacy given to the executor was accompanied

Of the distinction between admitting evidence to raise and to rebut an equity.

admitting parol evidence to repel this trust for the next of kin, arose in a great degree from the doctrine that in courts of equity an executor was not to be considered as any thing more than a trustee (3). But since the case of *Foster v. Munt*<sup>a</sup>, an executor has been uniformly regarded as entitled to the whole undisposed of residue, unless there is a violent presumption to the contrary, which, a legacy given to him by the testator, without any disposition of the surplus, was by that case considered as affording.

It would be endless to enumerate the cases upon this subject (4), but it may be useful to observe that

Mr. Justice Buller's observations on the

<sup>a</sup> 1 Vern. 473. 2 Vern. 676.

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by an exception of part of the property which was the subject of it, and which part, not being otherwise disposed of, would have fallen into the residue, and so have defeated the testator's purpose, considering the legacy not as an exclusion, yet such exception was not held to afford any inference in prejudice of the executor. The case was, however, decided against the executor, on account of the weakness of the evidence which was adduced on his side. Upon the whole, it may be stated, that the leaning of courts of equity is strongly against the executor's being excluded by having a particular legacy bequeathed to him; and in the recent case of *King v. Denison*, 1 Vez. and Beames 278. it was observed, by the present Chancellor, that the doctrine had given so little satisfaction that case upon case had occurred paring down its application, until it was not easy to say upon what foundation it stood.

(3) See the case of the *Duke of Rutland v. the Duchess of Rutland*, 2 P. Wms. 212. and the observations of Powis J. in *Rachfield v. Careless*, 1 P. Wms. 548. That an executor and administrator having paid all debts, legacies and funeral expences, was compellable to divide among the next of kin, was a proposition in 2 Inst. 33. inadvertently laid down.

(4) In *Clennell v. Lewthwaite*, 4 Vez. Jun. 471. which was

admissibility of parol evidence in these cases.

Mr. J. Buller, sitting for the Chancellor, in the case of *Nourse v. Finch*<sup>b</sup>, discovered a sentiment very strong against admitting parol evidence *at all* in such cases, avowing the short period of his authority in that court as his reason for declining an opposition to the series of authorities in the same court, the other way. It appeared also to be the clear opinion of the Judge, that even under these authorities, at most, only that part of the evidence could be admitted, which referred to the time of the making of the will: and he probably would have rejected the evidence offered, on *that* ground, if, under his third view of the case, it had not been clear against the executrix. The force of Mr. J. Buller's objections have been acknowledged by great authorities, since the decision above-mentioned.

Of the general admissibility of parol evidence to repel the presumption against the executor.

The decree of the Judge was afterwards confirmed by Lord Chancellor Loughborough, on the insufficiency of the evidence offered. But since the case of *Clennel v. Lewthwaite*<sup>c</sup> in which the reasoning of the Judge in *Nourse v. Finch*, was much under review and ably observed upon, it seems to have been regarded as settled, that parol evidence of all kinds is admissible to rebut the resulting equity for the next of kin arising from any circumstances in a will by implication excluding the executor from the benefit of his legal title: and it seems to be of no importance, as to the mere question of admissibility, whether the mat-

<sup>b</sup> 1 *Veaz.* Jun. 344.

<sup>c</sup> 4 *Veaz.* Jun. 471.

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decided above thirteen years ago, it was observed by the Master of the Rolls, that the cases on the question were so numerous, that it was a disgrace to the court.

ters in proof were contemporary with, or subsequent to, the will, although there is admitted to be a great difference in the weight of this testimony, as it refers to a contemporary or subsequent period.

All the cases were then set forth in the order of time in which they were decided, and profoundly commented upon by the late Lord Alvanley, who yielded to the pressure of authorities for admitting the extrinsic evidence in these cases, except where the expressions of the will carried so prevailing an import against the executor, as to amount to a *declaration* of the trust for the next of kin ; which, according to the effect given to it in *Rachfield v. Careless*<sup>a</sup>, will shut out all access to argument from external circumstances. Finally, in *Trimmer v. Bayne*<sup>b</sup>, the doctrine received its full confirmation from the present Chancellor, who declared the sum and sense of all the authorities to be, that all parol *declarations*, whether made *before*, or *at*, or *after* the making of the will, were admissible to *rebut presumptions*, though they are not all alike weighty and efficacious. Whether they consist of conversations with people who have nothing to do with the question, of declarations provoked by impertinent enquiries, or in whatever form they arise, they are *all* evidence, though intitled to very different credit and weight, according to times and circumstances ; as will be further explained in the succeeding Section.

<sup>a</sup> 2 P. Wms. 158.

<sup>b</sup> 7 Vez. Jun. 518.



## SECTION VII.

*Testator's Declarations, how far evidence.*

Contemporary declarations are most to be attended to.

IN the case of *Druce v. Dennison*<sup>a</sup>, Lord Eldon observed, that formerly the courts were very jealous of admitting evidence of declarations by the testator, except such as were made by him about the time of making the will; and towards the conclusion of his decree in that case, he remarked, that in receiving parol evidence, it gave him great satisfaction to find, that it was contemporary with the will. So in *Nourse v. Finch*<sup>b</sup>, Buller J. expressed a stronger opinion against admitting declarations which did not take place at the time of making the will. And the further we go back in tracing this disposition to reject parol evidence of declarations made before or after the will, the more strongly we find it expressed. Thus, Lord Hardwicke observed<sup>c</sup>, that the time of making the declarations was very material, and no regard ought to be paid to declarations not made at the time of making the will. Thus, again, in the case of the *Duke of Rutland v. the Duchess of Rutland*<sup>d</sup>, it was said by Lord Macclesfield, that allowing parol evidence was exceedingly dangerous, and not to be done in the case of discourses made at a different time from that of making the will. And, again, by Tracy J.<sup>e</sup> it was said, that no regard ought to be paid to expressions before or after the making

<sup>a</sup> 6 Vez. Jun. 385.      <sup>b</sup> 1 Vez. Jun. 359.      <sup>c</sup> 1 Vez. 324.

<sup>d</sup> 2 P. Wms. 215.      <sup>e</sup> 2 Vern. 625.

of the will, which possibly might be used by the testator, on purpose to disguise what he was doing, or to keep the family quiet, or for other secret motives or inducements.

The positions of the present Chancellor in *Trimmer v. Bayne*<sup>f</sup> are to be read with discrimination; what he there observes as to the general admissibility of parol declarations, is applicable, and was applied only, to the question, whether an executor being also a legatee in a will is a trustee for the next of kin, or beneficially entitled to the residue undisposed of; which is a question of rebutting an equitable presumption; as has been explained in another place. His Lordship then lays down the affirmative with respect to the general admissibility of parol declarations to repel this presumption of equity in favour of the next of kin, with the following important distinctions, viz. that in the degrees of such evidence, contemporary declarations are clearly of the greatest weight;—next to such contemporary declarations, those which are made *after* the making of the will are the most efficacious, for, a declaration *after* the will as to what the testator had done, is entitled to more credit than one *before* the will as to what he *intended* to do, for that intention may very well be altered; but he *knows* what he *has* done, and is much more likely to speak correctly as to that, than as to what he *proposes* to do.

Declarations made after are more to be regarded than such as were made before the will.

But with these, and perhaps other distinctions, such parol declarations by a testator are all alike admissible—they are to be decided upon by their *weight*—but by their *nature* they are all admissible.

But with different degrees of weight all these declarations are admissible.

ble<sup>a</sup>. The caution, however, with which all declarations by a testator should be admitted, is well pointed out in the same judgment, in *Trimmer v. Bayne*, viz. that these declarations may be made with a view to delude, as being thought a necessary artifice to keep the peace of families: and in the same case it was one of the grounds of the judgment, that the declarations there stated to have been made, and offered as evidence, had an evident purpose of deceiving the person making the inquiry.

<sup>a</sup> Vide *Trimmer v. Bayne*, 7 Vez. Jun. 519.

## CHAP. II.

## OF THE LAW RELATING TO THE DUTIES OF EXECUTORS AND ADMINISTRATORS.

## SECTION I.

*The capacity for the office.—The manner of appointment thereto—The refusal and acceptance thereof—what may be done before probate.*

**A** PERSON excommunicated, until absolution<sup>a</sup>;— an alien belonging to a country at war with us and residing abroad, or here without the king's licence<sup>b</sup>;— persons who from any cause are without common understanding, or who want the common inlets of knowledge<sup>c</sup>, are incapable of the office of executor or administrator.

Who may, and who may not, be executor.

But an infant may be appointed, (though by 38 Geo. 3. c. 87. § 6. he cannot act until he is twenty-one, and an administrator must be substituted in the mean time<sup>d</sup>.)

<sup>a</sup> 2 Burn's Eccl. L. 246.

<sup>b</sup> 3 Bac. Ab. 6. Ld. Raym. 282. 6 T. R. 23. 35.

<sup>c</sup> 3 Bac. Ab. 7. <sup>d</sup> 2 Bl. Com. 503.

and so may a married woman with the consent of her husband<sup>e</sup>; but if she is under twenty-one he shall exercise the office<sup>f</sup>.

A foreigner belonging to a country at peace with us<sup>g</sup>, a Roman Catholic conforming to the requisites of the 31 Geo. 3. c. 32. and a person outlawed or attainted<sup>h</sup>, are also capable of being executors.

Appoint-  
ment.

The appointment of an executor is grounded on the will, and he may be constructively appointed by any words denoting the testator's intention to invest him with the character.

The office may be qualified either as to the *time* of its taking place, its *duration*, or the *subjects* to which it is to extend; and may be committed to several persons, as co-executors, who are then considered in law as an individual.

Of the re-  
nuncia-  
tion.

An executor must, on being cited, appear before the ordinary, or he becomes liable to excommunication for a contempt. He may then renounce the office by refusing to take the customary oath, or if he be a Quaker the affirmation<sup>i</sup>: but this cannot be done by a mere verbal declaration, for his renunciation must be entered and recorded in the spiritual court before the ordinary<sup>k</sup>; nor after taking the usual oath before the surrogate, for thereby he will have made his election to act; nor after he has once administered. He cannot renounce in part<sup>l</sup>; neither can he assign the of-

<sup>e</sup> 3 Bac. Abr. 9.

<sup>f</sup> Off. Ex. 215.

<sup>g</sup> 3 Bac. Abr. 6.

<sup>h</sup> Co. Litt. 129.

<sup>i</sup> Ld. Raym. 363.

<sup>k</sup> Rolls Abr. 907.

<sup>l</sup> 11 Vin. Abr. 139, 1 Salk. 297.

fice to another, but in case of his renunciation administration with the will annexed will be granted to another.

If he renounces in person he must take an oath that he has not intermeddled with the effects of the deceased, and will not intermeddle therewith with a view of defrauding the creditors.

After administration granted he cannot assume the execution during the life of the administrator<sup>k</sup>, but after his death he may retract his renunciation, however formally made; and if administration be granted merely in consequence of his non-appearance he has a right at any future time to come in and prove the will<sup>l</sup>.

The acts which amount to an administration are all such as in law belong to the office of an executor; so that if there be two executors, and one of them has a specific legacy bequeathed to him, and he takes possession of it without the consent of his co-executor, such an act amounts to an administration.

What acts amount to an administration.

If there be several executors they must all duly renounce before administration with the will annexed can be granted: but if some only renounce, and the rest prove the will, those who renounced may come in at any future time and administer; and if they never acted during the lives, they may assume the execution of the will after the deaths of their co-executors, and

<sup>m</sup> 3 Bac. Ab. 42, 43.

<sup>n</sup> Com. Dig. Admon. (B. 4.)

shall be preferred to any executor appointed by them<sup>m</sup>.

**Derivative executor.**

The executor of an executor is to all intents and purposes the executor of the first testator<sup>n</sup>, and may be so named in legal proceedings<sup>o</sup>, and so on through any number of successive executorships; but if there are two or more original executors, the interest goes only to the executor of the last survivor; and if he renounces, the original executorship will not go to his executor, but administration will be granted<sup>p</sup>.

If the executor of an executor intermeddle with the administration of the effects of the first testator he cannot refuse the administration of the effects of the latter, but he may take upon himself the latter, and refuse the former<sup>q</sup>.

**The authority of executor is from the will, and is vested on the death of testator.**

The authority of an executor being derived from the will must be considered as completely vested at the instant of the testator's death. He may, therefore, before proving the will, do all that which an executor after probate may do, except that, although he may commence actions in right of the testator, yet he cannot declare; since in order to maintain his claim in a court of law, he must produce the probate; but when produced, it shall be considered as relating back to the time of suing out the writ<sup>r</sup>. He may also arrest a debtor to the estate, and shall be justified in that act

\* 1 Vin. Abr. 88.

\* 2 Bl. Com. 506. Plowd. 525.

\* 1 Leon. 275.

\* 1 Salk. 307. 311. 11 Vin. Abr. 68, 69. 114.

\* Shep. Touchst. 464.

\* 11 Vin. Abr. 202. Harg. Co. Litt. 292. b.

by this relation of the probate<sup>1</sup>. But such relation shall not prejudice a third person; and therefore when the debtor after being arrested by the executor before probate paid a debt to another creditor, and continued two months in prison, he was adjudged not to be a bankrupt from the time of the arrest so as to invalidate that payment<sup>2</sup>.

Relation of  
the pro-  
bate.

He may also before probate maintain actions on his own actual or constructive possession, as trespass, detinue, replevin and trover for goods or cattle of the testator taken or converted after the testator's death<sup>3</sup>.

Again, supposing him to have intermeddled, he may be sued at law by the creditors of the testator; as the law will not suffer him by his delay to impede the rights of those, to whom by his interference he has made himself responsible<sup>4</sup>.

If he dies before probate he is considered in law as intestate in regard to the executorship<sup>5</sup>; although he may have made a will and appointed executors, and although he die *after* taking the oath, if *before* the passing of the grant.

Where he  
dies before  
probate.

If A. be executor for a certain period, and B. nominated for the time subsequent, and A. prove the will, after that time has expired, B. may sue without another probate<sup>6</sup>.

<sup>1</sup> Roll. Abr. 917.      <sup>2</sup> 11 Vin. Abr. 204. 3 Bac. Abr. 53.

<sup>3</sup> 11 Vin. Abr. 203.

<sup>4</sup> Plowd. Com. 280. b. 11 Vin. Abr. 205. 2 Vern. 49.

<sup>5</sup> 11 Vin. Abr. 68. 90.

<sup>6</sup> Ca. Ch. 265. 11 Vin. Abr. 56.



## SECTION II.

*Of the Probate, Bona notabilia, and in general of evidence of wills in all courts.*

Of the different methods of proving the will.

THE proof of wills in the ecclesiastical court may be, as we have already shewn<sup>a</sup>, either in the common or in the solemn form. For the first method of proof nothing is requisite but that the executor should present the will before the judge, without any citation of the parties interested, deposing that it is the true and last will of the testator, upon which the will passes, and is allowed. But the proof in form of law, or in the solemn form, is, when the will is brought before the judge in the presence of the parties interested, who are cited to attend, and is subjected to a full examination before it is finally allowed.

Where the common form only has been pursued, the will is open to be disputed before the ecclesiastical judge at any time within 30 years; but where the more formal method has been adopted, the will cannot be disputed after the time limited for appeals has elapsed<sup>b</sup>.

When a will is proved in either of the before-mentioned forms, the original is deposited in the registry of the ordinary or metropolitan, and a copy in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been

<sup>a</sup> Vide sup. 1 Vol. 169. Where this subject is more fully considered.

<sup>b</sup> 3 Bac. Abr. 40.

proved before him. And these documents together constitute the probate.

In general, probate can only be granted in the court of the ordinary or metropolitan, but it may be granted by courts baron if they can found a claim to such privilege upon prescription, and have exercised it from time immemorial<sup>c</sup>. So also in some boroughs the probate of the wills of the burgesses may belong to the mayor by custom in respect to lands devisable within such boroughs; though still as to personal property the will must be proved before the ordinary<sup>d</sup>.

In common cases, if at the time of the testator's death his property be all comprised within one diocese, the executor ought to prove his will before the bishop of that diocese, or his surrogate.

BONA NOTABILIA are goods to the amount of 5*l*. except where the amount is varied by particular custom, as in London where they must amount to 10*l*<sup>e</sup>. and debts owing to the testator are bona notabilia as well as goods in possession<sup>f</sup>. If there are bona notabilia of the testator in two distinct dioceses, or in several peculiars within the same province, the will must be proved before the metropolitan<sup>g</sup>. If there are bona notabilia in several provinces, probate shall belong to the archbishop in each province in respect to the bona notabilia lying within his own province<sup>h</sup>; but if they lie partly in different dioceses of one province, and partly in one diocese only of the other; in

*Bona notabilia.*

<sup>c</sup> Salk. 41. Cowp. 286.

<sup>d</sup> 3 Bac. Abr. 40.

<sup>e</sup> 3 Bac. Abr. 37.

<sup>f</sup> 1 Roll. Abr. 909.

<sup>g</sup> 2 Bl. Com. 509. <sup>h</sup> 4 Burn's Eccl. Law, 234.

<sup>i</sup> 3 Bac. Abr. 36. <sup>j</sup> 1 Salk. 39. <sup>k</sup> 11 Vin. Abr. 76.

respect of the former, the archbishop shall have the probate; in respect to the latter the particular bishop<sup>1</sup>. If a man dies possessed of goods in London and Dublin, it seems that the grant of administration to the goods in London belongs to the archbishop of Canterbury, and of the goods in Dublin to the archbishop of Dublin<sup>2</sup>. If the death happen in one diocese, and all the effects are in another diocese, provided they amount to 5*l.* the archbishop shall have the probate<sup>3</sup>. But the goods which a man has with him, while on a journey, do not constitute bona notabilia in the place where they happen to be<sup>4</sup>.

Where a testator dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there must be separate probates for them respectively<sup>5</sup>.

Probate always belongs to the archbishop if the party dies beyond sea, though he leaves goods in one diocese only<sup>6</sup>. And the probate of every bishop's testament, or granting administration of his goods, although he has no goods but within his own diocese, belongs to the archbishop<sup>7</sup>.

If the probate be granted by a bishop or inferior judge when it does not belong to him it is *void*; but if it be granted by the metropolitan when it does not belong to him, it is only *voidable*, and is of force until reversed by sentence<sup>8</sup>.

<sup>1</sup> Off. Ex. 48.<sup>2</sup> Gibs. 472.<sup>3</sup> 11 Vin. Abr. 80.<sup>4</sup> Off. Ex. 45.<sup>5</sup> 4 Burn's Ecc. L. 232. 1 Bl. Com. 380.<sup>6</sup> 3 Bac. Abr. 36. Roll. Abr. 236.<sup>7</sup> 4 Inst. 335.<sup>8</sup> 4 Burn. Eccl. L. 193. 11 Vern. Abr. 75. 80. Gibs. 472.

Whatever may be the amount of the testator's effects in the diocese in which he dies, unless he leaves in another diocese goods to the value of 5*l.* they will not be *bona notabilia*<sup>\*</sup>, though if there are goods in two other dioceses amounting to 5*l.* in the whole they shall be *bona notabilia* and give the archbishop the probate<sup>\*</sup>.

A lease or term for years, if of the value of 5*l.* is *bona notabilia* where the lands lie<sup>†</sup>; and debts<sup>‡</sup> due to the deceased of that amount, however desperate, are also *bona notabilia*; but if there be a bond in the penalty of 5*l.* for the payment of a less sum though forfeited, it shall not be considered as *bona notabilia*<sup>§</sup>.

Debts by specialty are *bona notabilia* in that diocese where the securities were, and not where the testator lived, at the time of the testator's death<sup>¶</sup>; but debts by simple contract follow the person of the debtor, and are therefore *bona notabilia* in the diocese where the debtor resided at the time of the creditor's death<sup>‡</sup>. Thus a judgment obtained in one of the Courts of Westminster, makes *bona notabilia* where the record is. But a debt on a bill of exchange follows the person of the debtor<sup>‡</sup>.

An executor incurs a penalty of 50*l.* under the Stat. 37 Geo. III. c. 90. s. 10. if he acts but neglects Penalty on acting without

<sup>\*</sup> 3 Bac. Ab. 37.

<sup>†</sup> 4 Burn's Ecc. L. 232. 1 Roll. Abr. 908, 909.

<sup>‡</sup> 3 Bac. Ab. 37.      <sup>§</sup> 3 Bac. Ab. 47.

<sup>¶</sup> Off. Ex. 46.      <sup>‡</sup> 3 Bac. Ab. 37. Shep. Touchst. 463.

<sup>‡</sup> Dyer 305. in note. 11 Vin. Ab. 80.

<sup>‡</sup> 3 Salk. 164. Ld. Raym. 854. 11 Vin. Ab. 77. 80.

taking out  
probate for  
six months.

to take out probate within six months after the death of the testator<sup>b</sup>; nevertheless, if he accepts the office, he is still entitled to the probate; and upon the Ordinary's refusal may have a writ of mandamus to compel him to grant it<sup>c</sup>. But the Bishop may return to the writ the pendency of a suit before him in respect to the will<sup>d</sup>.

An executor  
cannot  
have probate  
till 21.

Before the statute 38 Geo. III. c. 87. an infant of the age of seventeen was capable of taking out probate, and consequently of maintaining an action as executor, though during his minority he must have sued by guardian or prochein amy; but by this statute he cannot have probate till he attains the age of twenty-one, and is by consequence restrained from bringing an action till that period.

Where  
there are  
several ex-  
ecutors,  
probate  
may be  
granted to  
one with a  
reserva-  
tion for the  
rest:

Where there are several executors one may take out probate with a reservation for the rest, who may afterwards apply for the probate which will be granted to the person applying, annexed to an engrossment of the original will<sup>e</sup>; but if they all apply together, one probate is sufficient<sup>f</sup>. A probate may be commensurate with the will, and limited to the specific effects to which the will extends, and an administration may be granted with respect to the rest of his property.

Where  
there is  
both real  
and personal  
property  
probate  
must be of  
the entire  
will.

No probate ought to be granted of wills concerning lands only; but where there is both real and personal property, there must be an entire probate<sup>g</sup>. On which subject the law was distinctly laid down by

<sup>b</sup> 11 Vin. Ab. 205.

<sup>c</sup> 4 Burn's Eccl. L. 244.

<sup>d</sup> 4 Burn's Eccl. L. 244.

<sup>e</sup> 11 Vin. Ab. 57. 60. 117.

<sup>f</sup> *Ld. Raym.* 262. *Burr.* 2295.

<sup>g</sup> 3 Bac. Ab. 30.

<sup>h</sup> 2 Salk. 552. 3 Salk. 22.

Berkeley J. in the case of *Netter v. Percival Brett*<sup>h</sup>, who there said, that “ he would insist upon two rules, first, that the probate of testaments for personal things appertains only and properly to the spiritual court: and for the probate of such testaments no prohibition lies. Secondly, that the probate of testaments concerning lands only, and no goods contained therein, ought not to be proved in the spiritual court by compulsion, although they *may* be proved there: and if there be a suit to compel any to prove such testaments in the spiritual court, a prohibition lies. Then when a will is concerning lands and goods, and is one entire will, it must be proved entirely in the spiritual court. And the probate of the will for the land will not prejudice the heir, for it shall not be evidence at the common law; nor shall the examinations of the witnesses there examined be given in evidence at the common law.”

If a will containing personal bequests, comprise also a disposition of land to the value of 100,000*l.* the ecclesiastical court may cite the parties to bring in the original to be proved *per testes*, and the Court of King's Bench ought not to prohibit them<sup>i</sup>.

Where the absence of a testator has been so long as to ground a reasonable presumption of his death, the executor is permitted to prove, on swearing that he believes him to be dead<sup>k</sup>. And where it happens that the executor cannot be found, temporary administration may be granted<sup>l</sup>.

<sup>h</sup> Cro. Car. 395. and see the contrary determination in Cro. Jac. 346. denied by Lord Holt in *Hudson v. Fisher*, Cas. Temp. Holt. 180.

<sup>i</sup> Skinn. 174.

<sup>k</sup> Swinb. part 6. J. B.

<sup>l</sup> Roll. Ab. 907.

If a will be made in a foreign country disposing of goods in England, it must be proved here<sup>m</sup>; but if the effects were all abroad, and the will be proved according to the custom of the country where the testator died, it is sufficient, and the executor may plead such matter to a bill filed against him by the administrator for an account of the personal estate of the deceased<sup>n</sup>.

In order to prevent probate, a caveat must be entered in the ecclesiastical court, which will be effective during three months.

The probate is conclusive evidence as to the will itself. But the legal existence of the probate itself may be controverted.

The spiritual court will revoke (1) the probate of a will, if it can be proved that it has been fraudulently obtained, or that the will itself had been revoked<sup>o</sup>; but before probate is revoked, the court will not grant a new one<sup>p</sup>. When properly granted it authenticates the right of the executor, and relates to the time of the testator's death<sup>q</sup>. And as long as it remains unrevoked it cannot be contradicted, but must be received as conclusive, in the temporal courts<sup>r</sup>. Thus against the seal of the ordinary no evidence will be admitted to prove the will forged or fraudulently obtained, or the testator non compos, or that another

<sup>m</sup> 11 Vin. Abr. 58.

<sup>n</sup> 11 Vin. Abr. 59, 69. 1 Vern. 397.

<sup>o</sup> Off. Ex. 48.

<sup>p</sup> 7 Mod. 146.

<sup>q</sup> 11 Vin. Abr. 205.

<sup>r</sup> 1 Ld. Raym. 262.

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(1) Where the issue is whether a will made of lands and goods is revoked, it is properly triable at common law; but if the question be whether a will of goods only be revoked, it is properly triable in the spiritual court. See Denn's case, Cro. Car. 114.

person was executor, which points be ong exclusively to the ecclesiastical jurisdiction, but that the *seal itself* was forged, or that there were bona notabilia, may be shewn by evidence; as by such evidence the authenticating effect of the seal is not disputed, supposing it to have been duly obtained; but the legal existence of the probate itself is controverted\*. The probate is properly to be considered as in the nature of a *sentence* of the ecclesiastical court, and this is the true reason of its being held conclusive as to the will of the executor†. And it is conclusive in courts of equity as well as in courts of law. Even a foreign probate where the testator died abroad, and his personal estate was wholly in the foreign country, may be pleaded to a bill claiming on the ground of intestacy‡, as we have already stated.

Of wills of land the validity is entirely a matter for the cognizance of the ordinary courts of law. (2) But where a particular clause, and not the whole of a will,

Questions affecting the validity of wills are

\* Strange 671.

† Allen v. Dundas, 3 T. R. 125. 12 Vez. Jun. 298. 307. 1 Vern. 397.

‡ 1 Vern. 397.

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(2) It has long been settled, that a court of equity will not set a will aside, upon a suggestion of fraud in obtaining it. In Bennet v. Vade and others, 2 Atk. 324. this was said to have been settled ever since the case of Powis v. Andrews, 3 Bro. P. C. 476. on the ground that a will of personal estate may be set aside in the ecclesiastical court, and of real estate in a court of law for fraud. If the testator be imposed upon in making his will, then it is not his will, and that is a question of fact, and proper to be tried upon an issue of *devisavit vel non* in a court of common law, if the will relates to real estate. And see the difference between a will and a deed in this respect, in James v. Greaves, 2 P. Wms. 270.



proper for  
legal cog-  
nizance.

has been impeached on the ground of fraud; or if the fraud has consisted in obtaining the consent of the next of kin to the probate, courts of equity have laid hold of these circumstances to declare an executor a trustee for the person injured by fraud \*.

Of the pe-  
culiar re-  
lief which  
equity  
affords.

But although equity refuses to interfere in a direct manner to set wills aside for fraud in making or obtaining them, it will take from a person all benefit under a will to which he has fraudulently entitled himself, and will compel the performance of all promises and assurances upon the faith of which any such benefit has been procured. For the sake therefore of baffling all such base projects, courts of equity will lay hold on the conscience of the deluder, and make him a trustee for the party injured by the breach of confidence: which is a method of relief peculiar to these courts, and by which the legal effect of instruments is saved from disturbance, and private justice is done without breaking in upon the rules or the province of the common or ecclesiastical law. So if by false representations or assurances a person intending to make a will, or to insert a particular bequest or provision, is induced to leave such intention unexecuted, equity will bind the conscience of the imposing party, and through the medium of a trust compel a specific performance. Thus in *Chamberlain's case*†, where an eldest son, his father being about to make his will, and thereby to make certain provisions for his younger children, persuaded him not to make any such will, for that he would take care his brothers and sisters should have such provisions, they were decreed in Chancery to be made good by the heir.

\* *Strange 666.*

† *Prec. in Ch. 4.*

So, if a man, having made his will, and his son executor, had said, when he was dying, that he had a mind to leave his wife executrix, and the son had said, "Dont trouble yourself to alter the will, for I will let her have the surplus and act as executrix," the court of Chancery would decree it accordingly <sup>a</sup>. It is proper, however, to apprise the Reader, that he will meet with many cases in which the equitable relief in matters of fraud has been carried to the extent of setting wills aside for fraud in a direct manner <sup>a</sup>. But since these cases we have Lord Hardwicke's clear and decisive opinion that the law is settled as is above stated. (3)

Since a probate is conclusive until it is repealed, and a court of common law cannot receive evidence to impeach it, it has been determined that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the deceased though the probate should be afterwards revoked <sup>b</sup>, but payment of money under probate of a supposed will of a living person is void, because in such case the ecclesiastical court has no jurisdiction, and the probate can have no effect.

Payment to an executor who has got probate of a forged will discharges the debtor.

<sup>a</sup> Gilb. Eq. Rep. 11.

<sup>a</sup> Welby v. Thornough, Prec. in Ch. 123. Herbert v. Lounder, 1 Ch. Ca. 22. Maundy v. Maundy, id. 123. Goss v. Tracy, 1 P. Wms. and Farrington v. Knightley, 4 Ed. 548.

<sup>b</sup> Allen v. Dundas, 3 T. Rep. 125.

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(3) Mr. Powell has attempted a distinction by way of reconciling these cases, in which there is more subtilty than precision. Pow. de Dev. 696.

It is also holden, that pending a suit in the spiritual court respecting the validity of a will, an indictment for forging it ought not to be tried, and it is the practice to postpone the trial till that court has given sentence<sup>c</sup>.

Probate no  
evidence  
of a devise  
of real  
estate.

The probate of a will in the spiritual court is no evidence of a devise of real estate<sup>d</sup>: it is no proof of the contents of the will in respect to that description of property, even though the original will is lost. Nor is it receivable as evidence when it is offered not to establish a devise, but for the purpose of proving a pedigree or relationship only<sup>e</sup>. Thus, says Mr. J. Buller<sup>f</sup>, where a person would prove the relation of a father and son by his father's will, he must have the original will and not the probate only, for where the original is in being, the copy is no evidence; besides the seal of the court does not prove it a true copy unless the suit only related to personal estate. But the ledger book, continues the same authority, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relation, the rolls of the spiritual court which has authority to enrol all wills, are sufficient proof of such testament. And under particular circumstances, the ledger book may be evidence even of a devise of real estate; as where, in an avowry for a rent-charge, the avowant

<sup>c</sup> 3 Bac. Abr. 34. 1 Stra. 481. 703. 3 T. R. 126. see also Eq. Ca. 207, 208. Palm. 163.

<sup>d</sup> Bull. N. P. 245.

<sup>e</sup> 1 Lord Raym. 732. Doe dem Ash v. Calvert, 2 Camph. 389.

<sup>f</sup> N. P. 246.

could not produce the will under which he claimed, as it belonged to the devisee of the land, but produced the ordinary's register of the will, and proved former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged.

But it has often been holden that a copy of the ledger book is not evidence; yet, since the original would be read as a roll of the court without further attestation, it seems fit the copy should be read. The contrary practice has been founded upon the mistake, that the ledger book is read as a copy, so that the copy of that is but the copy of a copy; whereas the ledger book is read as the roll of the court.

The ledger book, or a copy, seems to be evidence as to personal estate.

But the law will not allow these rolls or registers to prove a devise of land, when the claim is by the operation of the will itself, for to that purpose the ecclesiastical courts have no power to authenticate wills. Neither will an exemplification under the great seal be evidence of a will in a trial at law<sup>c</sup>. But where the will can be had, the will itself must be produced to substantiate a title to lands under it. Therefore, where in evidence to a jury at bar in ejectment, the defendant made title as a purchaser under a devisee, and shewed only a bill in Chancery preferred by the heir, under whom the lessor of the plaintiff claimed, against the devisee, wherein the will was set forth, and also the answer in which it was confessed; it was held by Keeling and Moreton Justices, (*Twysden contra*) that this was no evidence, though they proved possession according to the devise; and that this had

But not as to land.

<sup>c</sup> Comb. 46.

been confessed by the plaintiff in former trials; because the will itself was the best evidence of its own existence.

But where the original will can be proved to be lost, the probate even of a will of lands may be evidence.

But where the original will can be proved to have been lost, the probate even of a will of lands was considered by Lord Holt as good evidence<sup>a</sup>. Thus where it appeared upon evidence in ejectment, that a will was made of the lands in question in 1647, which will was lost, but mention was made of it in the calendar (which is the index of the register in the spiritual court,) and also in the seal book, and that a commission issued in April 1748 to examine the executors upon oath, &c. which being returned, probate had been granted in May 1648, and the probate was produced in evidence, Holt C. J. allowed it at the assizes to be good proof of the will, but reserved it for further consideration; afterwards, however, as well in the King's Bench as at Nisi Prius upon other trials, he declared himself to hold to his first opinion.

As it seems that where a will remains in Chancery by order of the court, or wherever a will is lodged in a court that has jurisdiction over the subject-matter of it, the copy becomes evidence, upon the principle that the will has thereby become a roll of the court, and might itself be read without further attestation, and so by consequence a copy of it ought to be permitted to be read<sup>1</sup>.

The copy of the probate, (but not a copy of the original will<sup>b</sup>) is unquestionable evidence where the

<sup>a</sup> St. Segar v. Adams, 1 Lord Raym. 731.

<sup>1</sup> Gilb. L. of Ev. 74.

<sup>b</sup> Bull. N. P. 246;

will is of chattels, or as far as it regards chattels only, for to this purpose the probate is an original document taken by authority, and of a public nature<sup>1</sup>.

Where the probate is lost, the spiritual court does not grant a second probate, but gives out an exemplification of it from the record of the court, and such exemplification will be evidence of the proof of the will<sup>m</sup>.

Where the probate is lost an exemplification is given out.

To prove the fact of the revocation of a probate, an entry of the revocation in a book of the prerogative court, in which all causes were entered by the register, and which was kept as the only record of such proceedings, and of the decree of the court, has been admitted as sufficient evidence<sup>n</sup>.

Of the revocation of the probate.

In case of a revocation of probate all the intermediate acts of an executor are void, and this revocation may be procured either by suit or on appeal in the ecclesiastical court; but equity has allowed payments either of debts or legacies made by an executor under a revoked will without notice of the revocation<sup>o</sup>.

<sup>1</sup> 3 Salk. 154.      <sup>m</sup> *Shepherd v. Shorthouse*, 1 Strange, 412.

<sup>n</sup> *Ramsbottom's case*, 1 Leach, Cr. Ca. 30. note (c).

<sup>o</sup> 3 Bac. Abr. 50. 1 Cha. Ca. 126.

## SECTION III.

*Of the Letters or Grant of Administration.*

WHEN a person dies without a will he is said to die intestate, in which case the stat. 31 Edward III. c. 11. provides that the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; and they are thereby put on the same footing in regard to suits, and to accounting, as executors appointed by the will.

The stat. 21 Hen. VIII. c. 5. empowers the ordinary to grant administration either to the widow or next of kin, or to both of them, at his discretion, and to elect whom he pleases of two or more persons in the same degree of kindred.

Of the husband's right to administration.

Courts of law in the interpretation of the word 'friends,' in the statute of Edward, have given the first place to the husband, but his right may be controlled by circumstances\*: as where a husband parts with all his interest in his wife's fortune. But when a feme covert has power to dispose by will of a part of her property, and appoints an executor for that purpose, letters of administration will be granted to the husband for the rest<sup>b</sup>.

Wife and next of kin.

Again the ordinary is to grant administration of

\* 3 Bac. Abr. 55. in not. Com. Dig. Admor. B. 6.

<sup>b</sup> 4 Burn. Ecc. L. 232. Stra. 891.

the effects of the husband to the widow or next of kin, but he may grant it to either or both at his discretion<sup>o</sup>.

If the widow renounce administration it shall be granted to the children, or other next of kin of the intestate, in preference to creditors. The ordinary may also grant administration of part to the wife and of part to the next of kin<sup>d</sup>.

Consanguinity<sup>o</sup> or kindred is the connexion of persons who are descended from the same common ancestor, and may be either lineal or collateral. Lineal consanguinity is that which subsists between persons, one of whom is descended from the other in a direct line, as between a man and his father, grandfather, &c. ascending, and his son, grandson, &c. descending. Every generation in this kind of consanguinity constitutes a different degree. Thus a man is related to his father and his sons in the first degree, to his grandfather and grandson in the second degree, and so on.

Of the degrees of kindred.

Collateral relationship agrees with lineal, in that the parties are descended from the same common ancestor; but differs, inasmuch as they are not descended one from the other: thus, brothers, cousins, uncles and nephews, are of course collaterally related.

The mode of calculating the degrees of relationship is by counting upwards from one of the parties to the common ancestor, and from the common an-

<sup>o</sup> 11 Vin. Abr. 92. Str. 552.

<sup>d</sup> 11 Vin. Abr. 71. 3 Bac. Abr. 55. 1 Salk. 38.

<sup>o</sup> 2 Bl. Com. 202.



cestor down again to the other party, reckoning one degree for each person<sup>f</sup>.

Of these kindred those are to be preferred who are most nearly related. Of the next of kin, first the children, or if there be none of them, the father, or, if he be dead, the mother, is entitled to administration. Then follow in order, brothers whether of the whole or half blood, grandfathers, uncles or nephews; and in the last place cousins, and the females of each class in the same order<sup>g</sup>.

Relations by the father's and mother's side are equally entitled, provided they are in equal degrees of kindred.

A married woman who is entitled, cannot obtain administration without the permission of her husband, because he must enter into the administration bond, unless it can be shewn by affidavit that he is abroad, or otherwise incompetent, in which case a stranger may join in the security; but in either case the administration is granted to her alone<sup>h</sup>.

Where a married woman, a minor, is next of kin.

If a married woman who is not of age be the next of kin, she may chuse her husband to be her guardian to take the administration for her use and benefit during her minority; and on her coming of age a new administration may be granted to her.

There are certain legal disqualifications which may prevent a person from being an administrator, besides

<sup>f</sup> 2 Bl. Com. 207.

<sup>g</sup> 2. Bl. Com. 505.

<sup>h</sup> 11 Vin. Abr. 85. 4 Burn's Ecc. L. 241.

those which would disable him from acting as an executor; as being attainted of treason or felony, outlawry, imprisonment, absence beyond sea; but an alien, who might have been an executor, may be an administrator<sup>1</sup>.

No person can properly act as an administrator until letters of administration are granted to him; but if he omits taking out letters of administration within six months from the time he administers, he incurs by statute 37 Geo. III. c. 90. § 10. a penalty of 50*l*.

Letters of administration, unless in particular cases (as where the effects left are of a perishable nature, in which case the judge may decree them sooner,) do not issue until fourteen days after the decease of the intestate<sup>2</sup>.

When a person applies for letters of administration, he must swear that as far as he knows and believes the deceased made no will, and that he will truly administer the goods, chattels, and credits, by paying the deceased's debts as far as the property will extend, and that he will make a true and perfect inventory of all the goods, chattels and credits, and exhibit the same into the registry of the spiritual court at the time assigned him by that court, and render a just account of his administration when lawfully required. He must also, pursuant to the 21 Hen. VIII. c. 5. and 22 and 23 Car. II. c. 10. enter into a bond with two or more sureties conditioned for the performance of those duties.

What a person must do in taking out letters.

<sup>1</sup> 9 Co. 39 b. 4 Burn's Ecc. L. 233.    <sup>2</sup> 4 Burn's Ecc. L. 242.

An administration once committed to one of the next of kin excludes others, though equally related to the deceased, the maxim being “*qui prior est tempore potior est jure*”<sup>1</sup>.

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#### SECTION IV.

*Of particular and supplementary Administrations, and such as are granted on the death of an Executor or Administrator intestate.*

Of administration with the will annexed.

IF no executor be named in a will<sup>a</sup>, or one be named who dies in the life-time of the testator, or if he be incompetent to execute the office, or refuses to act, administration with the will annexed must be granted; though, if he subsequently becomes competent, such administration is no longer of force.

But in such cases administration will generally be granted to the residuary legatee if there be any, (even if it is uncertain whether there will be a residue,) rather than to the next of kin<sup>b</sup>.

Of administration during the infancy of the executor, or executors.

If the executor be a minor, administration must be granted until he comes of age (which by stat. 38 Geo. III. c. 87. is not until he is 21 years old); and if there be several executors, and all under age,

<sup>1</sup> 11 Vin. Ab. 116. 1 Vent. 218.

<sup>a</sup> 11 Vin. Ab. 69. 2 Bl. Com. 503.

<sup>b</sup> 11 Vin. Ab. 90. 94.

he who first attains the age of 21 years may prove the will, and the administration will cease\*. But the administration does not cease on the marriage of an infant executrix with a husband of full age. If one of the executors be of age, and the other a minor, he who is of age has the execution of the will<sup>d</sup>.

There is also another administration of this temporary kind which is granted during the absence of the executor, or next of kin; which lasts only till the executor or next of kin, respectively appear, and qualify themselves\*.

Another sort of administration is that which is granted while a suit is depending either with respect to the will or the administration, which is called an administration "*pendente lite*." During the pendency of a suit.

When the next of kin cannot receive any benefit from the estate, and refuse the grant, the course is for the ordinary to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor<sup>f</sup>; and if several creditors apply for administration, though the court may prefer one of them; yet upon petition of the rest, it will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own. When all the next of kin refuse. Administration by a creditor.

The ecclesiastical court will grant administration to the attorney of the executor, or of all the executors, or of all the next of kin, if they do not reside within Where administration will be granted to the attorney.

\* 4 Burn's Ecc. L. 240.

<sup>d</sup> 4 Burn's Ecc. L. 240. 11 Vin. Ab. 99. 1 Mod. 47.

<sup>f</sup> Roll. Abr. 907. <sup>e</sup> 4 Burn's Ecc. L. 230. 2 Bl. Com. 505.

ney of the  
parties en-  
titled.

the province, and if the effects are under 20*l.* such administration will be granted whether they are resident or not within the province. But an administration granted by a foreign court will not be taken notice of in an English court of justice, in respect to property situated here. Therefore, if a will be made in a foreign country, disposing of goods in England, such will must be proved here<sup>s</sup>. But it is otherwise if the effects are all abroad, and the will is proved according to the custom of the country where they happen to be.

Where the  
executor  
resides out  
of the ju-  
risdiction  
of the  
king's  
courts:

By 38 Geo. III. c. 87. After the expiration of twelve months from the testator's death, if the executor, to whom probate has been granted, is residing out of the jurisdiction of his Majesty's courts, on application of any creditor next of kin, or legatee grounded on affidavits in the form therein specified, stating the nature of the demand, and the absence of the executor, administration shall be granted.

Of a limit-  
ed admini-  
stration.

A special administration may be taken out, limited to a particular chattel. And this is sometimes of great importance to be done for the sake of obtaining an assignment of a term of years, to protect the inheritance of a purchased estate.

If an administrator be outlawed or imprisoned beyond sea, administration may be committed to another; but only while the incapacity lasts.

Where a  
bastard  
dies intestate.

If a person who has no kindred, or a bastard who can have none legally, dies intestate, the king as *ulti-*

*mus hæres*, is intitled to his property<sup>a</sup>: but in such case it is the practice to transfer the royal claim from the crown to the nearest connexion of the party to whom the ordinary of course grants letters of administration, with a reservation, as it is said, of a tenth or other small proportion of the property.

When there are two administrators, and one of them dies, the survivor is sole administrator<sup>1</sup>. If a sole administrator die, a new one must be appointed by the ordinary.

If a person dies intestate, leaving a father or other person who will be entitled to the administration entirely for their own sakes, being solely interested in the property, and not for the purpose of distributing the effects to others equally entitled, and such father or other person die before taking out letters of administration, his representative, and not the representative of the deceased will be entitled to the administration<sup>b</sup>. But in the case of a husband it has been settled that the court is bound by the statute 31 Ed. III. c. 11. to grant administration to the next of kin of the wife who shall be a trustee in equity for the husband's representatives<sup>1</sup>.

Where the person entitled to administer for his own sole benefit dies before taking out administration.

Where an executor or administrator after probate or letters of administration dies, without having fully administered, a fresh administration is granted of the

Of the administration de bonis non.

<sup>a</sup> 3 P. Wms. 33. 1 Woodes. 398.

<sup>1</sup> Ca. Temp. Talb. 127. 4 Burn's Ecc. L. 241.

<sup>b</sup> 11 Vin. Ab. 88. fol. 25. 1 P. Wms. 381.

<sup>1</sup> 3 Ath. 526. 4 Burn's Ecc. L. 235, 1 Vez. 16. 1 Wils. 169.

goods unadministered, called an administration *de bonis non* <sup>m</sup>.

Where an executor, also residuary legatee, dies before he has fully administered.

If an executor be also residuary legatee and die, (whether before or after probate) intestate, administration with the will of the first testator annexed shall be granted to the administrator of such executor, or if he made a will his executor will be entitled to such administration <sup>n</sup>.

Where a feme covert executrix and residuary legatee dies intestate.

If a feme covert be executrix, and also residuary legatee, and die intestate, the husband will be entitled to administer to the testator <sup>o</sup>.

Where a surviving executor renounces.

If a surviving executor renounces, administration is granted to the next of kin of the testator, and not to the representative of the deceased executor, even though he proved the will and acted <sup>p</sup>.

Where administration improperly granted is void, and where only voidable.

In cases where administration has been improperly granted, it is sometimes *void*, and sometimes only *voidable*. It is void if granted in derogation of the right of an executor; as where one has been named, and the will has been suppressed, or its existence unknown <sup>q</sup>, or before the refusal of the executor, or a fresh refusal of a surviving executor who refused in the life-time of his co-executor, or without competent authority. But where it is granted in derogation of the right of kindred according to the degrees of affinity, as to one not next of kin, or to one next of kin jointly with one not of kin, or to a creditor be-

<sup>m</sup> 11 Vin. Ab. 111.

<sup>n</sup> 11 Vin. Ab. 88. 92. Com. Dig. Admor. (B. 6.)

<sup>o</sup> 11 Vin. Ab. 89. 91. <sup>p</sup> 11 Vin. Ab. 90. 108. <sup>q</sup> Plow. 279.

fore the renunciation of the next of kin, in these cases it is avoidable only by the act of the Spiritual Court. It is subject also to be repealed when granted to the next of kin instead of the residuary legatee, and that even though there be no actual residue<sup>r</sup>, or if granted to the next of kin of a feme covert instead of her husband<sup>r</sup>.

But there are some cases in which, though an administration may be said to have been granted with some degree of irregularity, (as when among the kindred of the same degree administration is granted to the younger instead of the elder, or the female instead of the male, or to a creditor for a less instead of one for a larger amount), yet it does not seem to be within the competency of the Spiritual Court to revoke or repeal the grant<sup>r</sup>; nor is the abuse of the letters of administration a sufficient ground for repeal, as the ordinary ought to have taken sufficient caution in the first instance<sup>r</sup>. If after an administration be granted, a second be issued, and afterwards the first is repealed, the second shall stand<sup>r</sup>. In all cases the question of fact as to the next of kin is exclusively a matter of spiritual cognizance<sup>r</sup>.

It is plain that wherever the administration is void, and not merely voidable, the acts done under the administration will be of no validity; for the administration was void ab initio. So also where the administration is only voidable if it be reversed upon an appeal<sup>r</sup>. But all lawful acts of the first administration shall stand good, if it is only countermanded or

<sup>r</sup> Vent. 219.    <sup>r</sup> 11 Vin. Ab. 92.    <sup>r</sup> 11 Vin. Ab. 100. 116.

<sup>r</sup> 11 Vin. Ab. 115. 1 Vent. 219.    <sup>r</sup> Com. Dig. Admor. (B. 3.)

<sup>r</sup> 11 Vin. Ab. 92. 115.    <sup>r</sup> 11 Vin. Ab. 117. 3 T. Rep. 129.



revoked upon suit by citation; and it is always sufficient if a debt is *bona fide* paid to the visible administrator<sup>2</sup>. The debts, funeral expences, and legacies paid by an administrator, shall be allowed to be deducted in the damages recovered against him on the subsequent appearance of an executor.

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## SECTION V.

*Of the power and interest of an Executor or Administrator in respect to the Testator's property.*

Difference between an executor's own property, and that which is his as executor, in respect to the consequences of his legal acts, and situations.

THE law makes a cautious and salutary distinction between the property to which an executor or administrator is entitled in his own right, and that which he possesses in his official capacity. His own property, therefore, is all that will pass by a general grant, nor are the testator's effects liable to be taken in execution for the debts of his executor or administrator, or to be passed by the commissioners' assignment in case of his bankruptcy, or to be transferred by the marriage of the executrix.

Of terms of years, and leases.

Chattels real are such as partake of real estate, that is to say, such interests as are issuing out of, or annexed to, real estates, as terms for years though determinable on lives, and reversionary interests in such terms, next presentations to churches, estates by elegit, &c. These vest in the executor, and are distributable by him as assets of the testator; and if a

<sup>2</sup> Allen v. Dundas, 3 T. Rep. 125.

lease is renewed by an executor, the new lease shall stand in the place of the old one as assets<sup>a</sup>. An executor cannot waive a term of years of which his testator died in possession, though it be of no value, without a total renunciation of the 'executorship, unless he has not assets sufficient to pay the rent, in which case on giving notice to the lessor he may throw up the lease<sup>b</sup>. And though a term be merged in the executor by the accession of the inheritance, yet it will be *in esse* as to creditors and legatees<sup>c</sup>.

Though all chattel interests vest in the personal representative, yet where such chattels partake of the nature of real property, as leases for years, the law does not regard the executor as being fully possessed of them until he has entered: but where they are of such a nature as not to admit of actual entry, as is the case with all incorporeal hereditaments, the executor has an immediate possession by construction<sup>d</sup>.

Things of a personal nature pass to the personal representative, unless in certain excepted cases. Of personal things. Things animate, where they are of the tame kind, and likewise such as are naturally wild, provided they have been rendered tame by art, or kept in a confined state, belong to the executor; but animals, wild by nature, which are not so confined, or escape from their confinement and regain their natural liberty, are not considered as property, and therefore of course are not transmissible, except where they are in the habit of going loose and returning, or have a mark or collar upon them to denote the property in them.

<sup>a</sup> 3 Bac. Abr. 58.

<sup>b</sup> *Ld. Raym.* 554. 5 Rep. 30. *Hargrave's case.* 1 Salk. 297. Off. Exec. 120.

<sup>c</sup> 11 Vin. Abr. 129.

<sup>d</sup> 11 Vin. Abr. 240.

Fruit,  
grass,  
corn, and  
manure.

Many things affixed to or growing upon the freehold, and which, while so circumstanced, are part of the freehold property, become personal by separation from the freehold, as fruit gathered, or the plants and trees themselves, or their branches when felled or lopt. Within the description of personalty also are included the produce of the land raised by labour and manurance, as corn growing, and such like produce, and it seems also those grasses which are usually called *artificial grasses*°. So also what are usually called vegetables or garden stuff, and obviously all manure not spread upon the land<sup>f</sup>.

Inanimate goods of a moveable kind all fall under the description of personal chattels, to which class may be added property in any stock or fund.

Appren-  
tices.

The relation between master and apprentice is not transmissible to the executor<sup>e</sup>; though, if the parties consent, the apprenticeship may be continued with the executor in the same trade.

Literary  
property.

Literary property, and the interest in a patent, by virtue of the several statutes relating to them respectively, are transmissible to the executor; and it may be generally laid down, that whenever an absolute property in any moveable chattels was vested in the testator, such property vests in the executor immediately on the testator's death, and in the administrator by relation from the death, wherever they are situated; the law giving a constructive possession to such representative where actual possession cannot be had.

° 2 Black. Com. 122, 123.

<sup>e</sup> 1 Bl. Com. 427, 428. Stra. 1115. 1266. Doug. 70.

<sup>f</sup> 11 Vin. Abr. 175.

He is also entitled to all personal equitable rights of his testator, and to the benefit of all personal contracts made with him. As if a lease be contracted to be made to B. and B. die before the lease is executed, the right vests in the executor, and the lease when made becomes assets in his hands<sup>b</sup>. So also will the damages recovered for the breach of such a contract: but the choses in action of a testator shall not be assets till they are recovered and levied<sup>c</sup>; unless indeed they are released by the executor; for his release thereof is equivalent in law to a receipt of the same<sup>d</sup>. But where the cause of action arises after the testator's death, the debt or damages are assets in law before the recovery by the executor. If a contract were made with the testator concerning his real estate only, a breach after his death gives to his heir, and not to his executor, a title to the damages.

<sup>a</sup> All legal choses in action as well as equitable rights in personality come to the executor.

Chattels which were never vested in the testator in possession, or which were limited to him upon a future event or condition, may come to his executor, and be distributable as assets in his hands. As where A. is entitled to a lease for years, or for his life, remainder to B., and B. dies in the lifetime of A., upon the death of A. the term shall go to the executor of B., and be assets in his hands; and even during the life of A., while it continues a remainder, B.'s executor is entitled to sell such remainder for its present value, and to hold the produce as assets. So after the death of a pawnor or mortgagor, the right to redeem the chattel in pawn or mortgage devolves upon his executor, and the excess in the value of the thing beyond the money paid for redemption is assets.

<sup>b</sup> So also, future and conditional interests in chattels.

<sup>b</sup> 11 Vin. Abr. 231.

<sup>c</sup> 11 Vin. Abr. 239, 240.

<sup>d</sup> Hob. 66.

Of the testator's trade, and the consequences of the executors carrying it on.

A man's trade or business terminates in law on his death, and if the executor carry it on, he is said to carry it on at his own risk<sup>1</sup>, even though his name should not appear in it<sup>m</sup>. But under the sanction of the court of Chancery his representative capacity in respect to the business may be continued to him<sup>n</sup>. If he only disposes of the stock in trade he does not thereby become a trader, or subject to a commission of bankruptcy<sup>o</sup>.

Of the executor's interest in legacies so due to his testators.

A contract made with, or a gift, grant, or legacy to, a man and his assigns, upon the death of the donee or grantee before performance or payment, passes to his executor or administrator as his assignee in law<sup>p</sup>. But it is to be remembered that he is only an assignee *in law*; therefore it has been held that if A. binds himself to pay 10*l.* to the assignee of B. B.'s executor shall not have the money, because as executor he can only take to the use of the testator, though if the obligation were to pay the money to B. *or his assignee*, the right having vested in the obligee himself, would pass to his executor as assignee in law<sup>q</sup>.

What chattels follow the inheritance.

Things annexed to and consolidated with the inheritance shall accompany it; therefore rents which are incident to the reversion, and which have not become in arrear in the lifetime of the testator, do not belong to the executor; and if the lessor die on the day on which the rent is payable, after sunset, and before midnight, the rent does not go to the executor, but to the heir, as in strictness it was not due till the last

<sup>1</sup> 1 T. Rep. 295.

<sup>m</sup> Cooke's Bkpt. Law, p. 67.

<sup>n</sup> 2 Ves. Jun. 34.

<sup>o</sup> 1 Atk. 102.

<sup>p</sup> 11 Vin. Abr. 156.

<sup>q</sup> 11 Vin. Abr. 161.

minute of the natural day<sup>r</sup>. (1) So a term for years in trust to attend the inheritance shall accompany the real estate<sup>s</sup>, and the trustee of a term raised for a special purpose, shall hold the same after the purpose is answered in trust for the person having the beneficial interest in the freehold<sup>t</sup>.

If an absolute interest in a term, or the next presentation to a living, which is a mere chattel<sup>u</sup>, is granted to a man and his heirs, the law will give it to the executor of the grantee<sup>x</sup>. But the powers and remedies incident to a rent charge descend to the heir, and accompany the inheritance<sup>y</sup>, though the entry itself gives only a chattel interest to the party.

It is not competent to the guardian or trustee to change the value of an estate, unless he acts under a decree of a court of equity. Thus a lunatic's estate, if laid out in the purchase of lands, has been declared in equity to remain personal estate, and an account decreed<sup>z</sup>. The beneficial interest in a mortgage, unless controlled by positive provision, belongs to the personal representative, for the fund was personal, and the contract was personal, and so shall the security

<sup>r</sup> Har. Co. Litt. 202. n. 1.

<sup>s</sup> 11 Vin. Abr. 172.

<sup>t</sup> 11 Vin. Abr. 171.

<sup>u</sup> 11 Vin. Abr. 173.

<sup>x</sup> 11 Vin. Abr. 155.

<sup>y</sup> 11 Vin. Abr. 147.

11 Vin. Abr. 151.

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(1) But where a person having only an interest for his life in the land, demises it, and dies between the rent days, whereby the lease determines, his executors or administrators shall in an action for the use and occupation, recover a just proportion of the rent, from the last day of payment, to the death of the testator, by statute 11 Geo. II. c. 19. sec. 15.

be considered. Upon redemption, therefore, the heir must reconvey the land without receiving the money.

Tithe set  
out, muni-  
ments of  
land, &c.

If a person seised of an estate of inheritance in tithes die after they are set out, they will go to the executor<sup>a</sup>. Muniments of the land, such as charters, deeds and court rolls, pass with the estate to the heir; but if these writings are a deposit in the hands of another for securing a sum of money, the interest in them will devolve to the personal representative of such creditor on the principles before laid down.

Rabbits in  
a warren,  
fish in a  
pond, fruit,  
grass,  
hops, corn,  
&c.

As it has been before remarked of certain chattels personal connected with the estate, as rabbits in a warren, fish in a pond, &c. that they pass to the executor, with his chattel interest in the land, so they accompany the inheritance in its descent to the heir. Thus also trees and hedges unsevered, fruit ungathered, and grass growing, descend with the land to the heir as the permanent profits of the earth; though, as we have seen, *fructus industriales*, as corn raised by artificial culture, go to the executor. And so it is with hops, though growing on their ancient roots<sup>b</sup>.

Of the con-  
version of  
property.

Where an executor has so mingled the property of his testator with his own, that it cannot be distinguished from it, or the property is of such a nature as not to be capable of being specifically followed, such property must be considered as of necessity altered, as where it consists of ready money, which cannot be taken in execution on a judgment against the executor, as being *de bonis testatoris*. And as he is incapable of suing himself, he may retain his own

<sup>a</sup> Com. Dig. Biens. A. 2.

<sup>b</sup> Har. Co. Litt. 55. B.

debt out of the effects, which will amount to an entire conversion of the testator's property into his own, and that by mere operation of law, where his debt covers the whole assets.

The interest of an administrator as to the subject over which it extends, is commensurate with that of an executor. And so it is even where the administration is for a limited time, so long as it lasts. But in respect of authority, these particular and special administrations come short of the executor and general administrator, and vary from each other in many essential particulars. To all these restricted administrations, whether *durante minoritate*, *durante absentia*, or *pendente lite*, or in whatever other form, some powers belong in common. They may do whatever cannot be delayed without prejudice to that which is committed to their care. As for example, all produce which would grow worse by keeping, they may undoubtedly sell<sup>c</sup>. They may pay the testator's debts, and dispose of his unperishable property for that purpose<sup>d</sup>. They may also receive debts due to the testator<sup>e</sup>, and may bring actions to recover them<sup>f</sup>, and, lastly, they may retain debts which were due to themselves from the testator<sup>g</sup>.

Of the interest and authority of the administrator, and the differences in these respects between particular and general administrators;

An administrator with the will annexed may assent to a legacy<sup>h</sup>, but where the form of the grant is specially and expressly restrictive, as *ad usum et commodum infantis*, neither the power of assenting to a legacy, or of making leases, will go with the office.

With the will annexed.

<sup>c</sup> 11 Vin. Abr. 102. 103. Cro. El. 718. 5 Rep. 9.

5 Rep. 29. n. b. Hob. 250.

<sup>e</sup> Com. Dig. Admon. F.

2 P.Wms. 576.

<sup>f</sup> Com. Dig. Admon. F.

<sup>h</sup> 5 Rep. 29. b.



An administrator during infancy, may make leases of any term vested in the infant executor, which will be certainly good, till such infant executor come of age<sup>1</sup>, and it is said till he avoid it by his entry. But he can do nothing to the prejudice of the infant, therefore he ought not to sell unless there is a necessity for it<sup>k</sup>; nor, indeed, will his assent to a legacy be effectual, unless he has assets for its payment<sup>l</sup>, or his release of a debt, unless he has actually received it<sup>m</sup>.

Joint administrators.

A joint administration resembles in all respects a joint executorship<sup>n</sup>; and if one die, the right of administration survives to the others<sup>o</sup>.

Durante absentia.

The statute 38 Geo. 3. c. 87. sec. 7. gives the same powers to an administrator *durante absentia* as are vested in the administrator during the minority of the next of kin; and by section 4. of the same act, in case of the absence of an executor for a year after the testator's death, out of the jurisdiction of His Majesty's courts, and a suit is instituted in a court of equity by a creditor, the court in which the suit is pending is empowered to appoint persons to collect in outstanding debts, or effects due to the testator's estate.

As the personal goods of the deceased devolve upon the executor or administrator, he has a right to take peaceable possession of such effects, and if resisted he has his remedy by action<sup>p</sup>; and on producing the probate or letters of administration at the bank, he has a right to have the funded property of the deceased

<sup>1</sup> 6 Rep. 67. b.

<sup>k</sup> 2 And. 132.

<sup>l</sup> 5 Rep. 29. b.

<sup>n</sup> 1 Roll. Abr. 910.

<sup>o</sup> 2 Vez. 267.

<sup>p</sup> 2 P. Wms. 121.

<sup>11</sup> Vin. Abr. 267.

transferred into his own name. In a word, he has the same property in the effects of the deceased as the deceased himself had when living, the same power of disposing of them, and the same remedies for recovering or protecting them.

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## SECTION VI.

### *Of the Remedies at Law and in Equity.*

FOR the recovery and protection of the rights and interests which are thus vested in an executor or administrator, the law has armed them with adequate means. Whatever actions the testator might have had to enforce the performance of personal contracts, the executor is competent to bring in his representative capacity ; and even where the covenant for assuring lands was broken in the testator's life-time, the executor, though not expressly named, was held capable of bringing his action for the damages ; damages being in such a case the principal subject, and not accessory to the realty only\*.

For injuries done to the person or freehold of the testator, or what the law calls torts, the executor has no remedy.. But by virtue of the stat. 4 Ed. 3. c. 7. an executor is entitled to recover by action a compensation in damages for a trespass, in taking away the testator's goods in his life-time ; and by an equitable extension of the benefit of that statute, he may have other remedies for injuries done to the testator's

In what cases an executor has a remedy for a wrong done to the testator.

\* Com. Dig. Admon. B. 13.

chattels, in his life-time, as trover, for the conversion of the testator's goods, or trespass, for cutting the corn growing on his *freehold*, and carrying it away, or for entering with cattle on the testator's *leasehold* premises<sup>b</sup>. An executor is, also, under the same beneficial construction of that statute, entitled to a debt accrued to the testator for not setting out tithes, and to the remedy for such debt given by the statute 2 and 3 of Ed. 6. c. 13<sup>c</sup>. In a word, the executor may have his remedy by action for every injury done to the testator's personal estate before his death. And it seems also, that he may maintain ejectment for an *ouster* of the testator, even from premises whereof he was seised in fee, proceeding for damages only<sup>d</sup>, as a lessee may do where his interest expires, pending the suit. If the premises were leasehold, he is entitled to his ejectment for recovering the term by the common law. And on the same authority he may avow for rent in arrear at the testator's death, as incident to a reversion for years<sup>e</sup>. He may have his action of replevin for goods distrained in the testator's life-time<sup>f</sup>.

Where the cause of action has happened since the testator's death.

In numerous cases too, where the cause of action has happened since the testator's death, the executor may bring his action *as such*, where the subject of the action vests in him in that capacity. Thus he may maintain *quare impedit*, where the testator died possessed of a term in an advowson, and the disturbance was after such death; as he also might where the testator died within six months after the

<sup>b</sup> 3 Bac. Abr. 59. 1 Vent. 187.

<sup>c</sup> 1 Sid. 88. 497. 1 Vent. 30.

<sup>d</sup> 1 Vent. 30. 3 T. R. 13.

<sup>e</sup> 1 Roll. Abr. 672.

<sup>f</sup> 1 Sid. 82. Gilb. l. of dist. 3 ed. 156.

usurpation<sup>e</sup>. So also wherever a debt arose after the testator's death, upon a contract made with him in his life-time, or where a bond was forfeited, or the goods taken after that event. And he may avow in that character for rent of leasehold premises, becoming due from the under-tenant after the testator's death<sup>h</sup>. In like manner he may bring an action as executor, wherever a contract is made with him as such.

Where he is plaintiff in an action, which he must bring in his representative capacity, he pays no costs, either on a nonsuit or verdict; but if he may bring the action without naming himself executor, there he is liable to costs, whether he names himself executor or not, if he fail. As where in trover, both the trover and conversion were subsequent to the death of the testator<sup>i</sup>; or where he proceeds in assumpsit for monies had and received after that event<sup>k</sup>. Nor will he be exempt from costs where he fails through his own mispleading<sup>l</sup>, gross misconduct, or wilful default. For an escape out of execution on a judgment obtained by the testator, whether the escape happened in the life-time<sup>m</sup>, or after the death of the testator<sup>n</sup>, the executor may bring his action, and recover against the sheriff, in his representative capacity; so also where the escape happened on a judgment recovered by himself as executor. (2)

When an executor is, and when he is not, liable to costs.

<sup>e</sup> Poph. 189. 4 Leon. 15.

<sup>h</sup> 11 Vin. Abr. 204.

<sup>i</sup> 7 T. R. 358.

<sup>k</sup> 7 T. R. 234.

<sup>l</sup> 6 T. R. 654.

<sup>m</sup> Cro. Car. 297. Dy. 322.

<sup>n</sup> 3 Bac. Abr. 57.

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(2) 2 T. R. 128. Whether an action does or does not lie as between executors for an escape in the testator's life-time, depends upon the distinction between a tort which does, and a tort which does not, vest an interest in the party wronged. In the case of a

Of the relief given by the statute 17 Car. 2. c. 8.

At common law, if the plaintiff died after final judgment, and before execution, the executor or administrator might proceed to final judgment, by first suing out a *scire facias*; and, if the testator died after execution by *fieri facias* had been taken out by him, the sheriff might go on to levy the money, and might pay it over to the executor. If the plaintiff died at any time before final judgment, the suit abated, and the executor had to begin afresh. But by the statute 17 Car. 2. c. 8. if either the plaintiff or defendant in a cause, die after verdict, and before judgment, the death shall not be alleged for error, so as the judgment be entered within two terms after the verdict; and if the death take place *after* the assizes have commenced, though *before* the verdict, the case is remedied within the act. On this statute the judgment is entered as if the deceased party were still living\*; but before execution can be had upon it, there must be a *scire facias* to revive it, and judgment must be entered within two terms after the verdict, and such *scire facias* must proceed in conformity with the judgment, and be general, as on a judgment against the party, as if he were living.

\* 1 Salk. 42.

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*mere tort*, the rule of *actio personalis moritur cum persona* strictly holds. Thus an executor cannot maintain an action on the case for an escape on mesne process in his testator's life-time. But for an escape out of execution in his testator's life-time, an executor may have his action on the case, on the equity of the stat. 4 Ed. 3. In the case of a *devastavit*, that being a wrong vesting an interest, and a debt arising *ex delicto*, the action survives to the executor. See *Berwick v. Andrews*, 2 Lord Raym. 971. But an action will not lie against an executor for an escape in the life-time of his testator.

By the statute 8 and 9 Wm. 3. c. 11. sec. 6. provision has been made for the death of the plaintiff, after interlocutory, and before final judgment. The action in such case shall not abate, if it were of such a nature as might have been originally brought by the executor or administrator, but the executor or administrator shall have a scire facias against the defendant; or if the defendant die after such interlocutory judgment, against his executor or administrator. And if the defendant, his executor or administrator, appear, and shew no cause to arrest the final judgment; or on a scire facias, or two nihilis, make default, a writ of inquiry shall go, and being executed and returned, judgment final shall be given against the defendant, or against his executor or administrator. On this latter statute the judgment is to be entered for or against the executor or administrator, and not as under the stat. 17 Car. 2. for or against the party himself.

Of the relief given by the statute 8 and 9 Wm. 3. s. 6.

A temporary executor may bring actions as well as an executor generally constituted, and the same right devolves upon the executor of an executor by virtue of the statute 25 Ed. 3. c. 5. The husband of an executrix has also the full right of bringing actions, but he cannot sue in the representative capacity without joining his wife. As co-executors make but one person, in consideration of law, they must all join in such actions as are brought in his right, even those who have not proved the will<sup>p</sup>. And to prevent a collusion between a debtor and a co-executor the law has provided that if one executor refuse to join his com-

Temporary executor; executor of an executor; husband of an executrix; co-executors.

Summons and severance.

<sup>p</sup> Com. Dig. Pleader. (2. D. 1.)

panion in an action for recovering a debt due to the testator's estate, the willing executor first commencing the suit in the names of both, may afterwards, by summoning the other, obtain what is called a judgment of severance, which is an authority to sue alone; and the same judgment shall be given for default upon the summons; and then the executor so having summoned may proceed without the other, and the judgment and execution shall be in the name of the executor so proceeding alone<sup>1</sup>. So that if the party so severed die pending the proceedings, the suit shall not abate<sup>2</sup>.

*Of the remedies of an administrator.*

*Ad valorem duty upon administration.*

An administrator, has legal remedies corresponding and co-extensive with those of an executor. Even where their authority is special and limited they may maintain actions for recovering the property of their intestates<sup>3</sup>. By the 48 G. 3. c. 149. an ad valorem duty is imposed upon probates and letters of administration, and the stamp must be to the full value of the assets, including the outstanding debts due to the deceased. And the administration is invalid unless a stamp of a sufficient value is obtained. If an administrator brings his action to recover a sum of money due to the deceased which exceeds the amount covered by the ad valorem stamp, upon proof of the deficiency of the stamp, the action must fall to the ground; even though the claim which he seeks to enforce was doubtful. The act makes no allowance for dubious or hazardous debts. Nor will the plaintiff be allowed to establish his claim by evidence,

<sup>1</sup> 3 Bac. Abr. 33. Cro. Car. 420.

<sup>2</sup> Co. Litt. 139.

<sup>3</sup> 2 P. Wms. 576.

and afterwards to take out a stamp for the increased value. And it seems that a defendant will defeat the action by proving the assets, together with the sum claimed by the action, to exceed the value for which the stamp was taken<sup>†</sup>.

If the limited office of an administrator durante minoritate expire after judgment obtained by the executors attaining his age, such executor may have a scire facias to execute the judgment<sup>‡</sup>.

The distinctions in respect to the prosecution of suits interrupted by the deaths of the personal representatives should be carefully attended to. By statute 17 Car. 2. c. 8. an administrator de bonis non is rendered capable of suing a scire facias on a judgment after verdict recovered by an executor or administrator; which he could not do by the common law. And if the executor or administrator had sued execution, and before the return died, the administrator de bonis non, by the equity of the above statute, is permitted to perfect execution<sup>\*</sup>. And if at the time of the executor's or administrator's death, the money was actually levied, it shall be brought into court, and the administrator de bonis non, on producing his letters of administration, shall be entitled to receive it<sup>‡</sup>. And so it is said he would even if the judgment had been by default<sup>\*</sup>. The statute extends only to judgments after *verdict*, so that if the executor or administrator dies after obtaining judgment without a previous verdict, the case is at common law, and the administrator de bonis non, on account of his paramount title and want of privity, being representative of the first testator or

Of the consequences of the deaths of executors or administrators as to suits depending.

<sup>†</sup> Hunt v. Stephens, 3 Taunt. 113.

<sup>‡</sup> 3 Bac. Abr. 18. Cro. Car. 127.

<sup>\*</sup> 2 Lord Raym. 1072.

<sup>‡</sup> 2 Lord Raym. 1074.

<sup>\*</sup> 6 Mqd. 299.



intestate, is obliged to recommence the action<sup>a</sup>. But if such judgment were for goods taken out of the executor or administrator's own possession, the immediate representative of such executor or administrator shall have scire facias, and account with the administrator *de bonis non*<sup>b</sup>.

If an administrator *durante minoritate* obtain judgment he may have a scire facias against the bail, even after the excutor has attained his age, though it seems doubtful whether he or the executor shall sue execution<sup>c</sup>.

Of proof  
under  
bankruptcy.

An executor may prove a debt due to his testator under a commission of bankruptcy, and may sign as such the certificate, but if he has a demand of his own against the estate, as well as one in right of his testator, he will not be allowed to sign in both capacities<sup>d</sup>. The executor of the bankrupt is intitled to his allowance<sup>e</sup>.

Of obtaining  
an adjustment  
of the claims  
in equity.

Where an executor finds the administration of his testator's property embarrassed, difficult, or hazardous, he may have the claims of the creditors adjusted by a court of equity, by instituting a suit against the creditors for that purpose<sup>f</sup>.

Of the remedy  
of an executor  
against his  
co-executor  
in equity.

In equity one executor may sue his co-executor; and if co-executors commence proceedings in that court, and one of them die, the suit will not abate. And if an administrator *durante minoritate* bring his

<sup>a</sup> Cro. Jac. 4. 1 Roll. 5 Rep. 9. b.

<sup>b</sup> Yelv. 33.

<sup>c</sup> 2 Lev. 37.

<sup>d</sup> 1 Atk. 85.

<sup>e</sup> Id. 208, 209.

<sup>f</sup> Com. Dig. Chancery, 3. G. 6.

bill in Chancery, and the executor attain his age pending the suit, he may continue the suit by a supplemental bill <sup>a</sup>.

If pending the suit the plaintiff die, his executor may continue it by bill of survivor. And if a bill be brought by an administrator durante minoritate, and pending the suit the executor come of age, he may continue the suit by a supplemental bill <sup>b</sup>.

An executor may have relief by injunction in equity to restrain a person in possession of private letters of the testator from publishing them without the permission of the plaintiff <sup>c</sup>.

Upon the death of a partner in trade his interest in the stock devolves upon his executor or administrator, and shall not survive to the surviving partners; although the remedies for recovering the joint property survives. Equity treats the survivor as a trustee for the representatives of the deceased partner who are considered as having a specific lien on the share of the deceased <sup>k</sup>.

<sup>a</sup> Mitf. Plead. 61.

<sup>b</sup> Mitf. 61.

<sup>c</sup> Ambler. 737.

<sup>k</sup> 1 Vez. 242.

## SECTION VII.

*Of the duties of an Executor in respect to the Funeral and Official Charges, and payment of Debts.*

TO provide for the funeral is naturally first in order ; an office that may be discharged before probate ; and the expences connected with which stand in priority before all other debts and charges<sup>a</sup> ; but extravagance should be avoided, as unnecessary expence will not be allowed against the creditors. The amount should be regulated with reference to the circumstances of the deceased.

The proof of the will is the duty and charge which the executor is next called upon to perform and satisfy. The inventory succeeds, which, in pursuance of the bond to be entered into according to the stat. 22 and 23 Car. 2. c. 10. must exhibit a true and perfect account of the goods, chattels, and credits of the deceased which have come to the possession of the executor ; and though no such inventory is in practice exhibited in general cases, yet an executor or administrator is always subject to be cited for that purpose in the spiritual court ; and the spiritual judge will, in special cases, at the instance of a party interested decree an inventory to be exhibited before the issuing of the probate or letters of administration, and the same must be substantiated by a special oath<sup>b</sup>. An inventory, after being exhibited on oath, cannot be impeached in the ecclesiastical court ; yet objections may be made to it which must be answered upon oath,

<sup>a</sup> 11 Vin. Abr. 432.

<sup>b</sup> 4 Burn's Eccl. L. 266.

but such oath cannot be contradicted: the more effectual relief lies in a Court of Equity.

The next duty of an executor or administrator is the payment of the debts of the deceased which must be done in the legal order.

Of the legal order in which debts are to be paid.

First, the debts due to the crown by record or specialty.

Secondly, those arising upon certain statutes.

Thirdly, debts of record in general.

Fourthly, debts due by specialty in general.

Fifthly, debts due by simple contract;

And here it may be observed, that all obligations or specialties to the use of the king are of the same nature as a statute staple<sup>c</sup>, but to be entitled to this paramount preference, the debts to the king must arise by record or specialty; and therefore all debts to the king which are of no higher degree than simple contracts, though they are to be preferred to debts by simple contract due to the subject, are nevertheless inferior in rank to debts of record or specialty due to the subject: thus fines and amerciaments arising to the king in courts baron, or courts not of record, or for copyhold estates, or forfeitures by outlawry or attainder before office found, are not entitled to the preference above stated to belong to the crown. But if the king's immediate debtor be outlawed, then whether such debt becomes a debt of record by the outlawry or not, will depend upon the fact whether it be on mesne process, or after judgment. In the former case it is not, in the latter it is, a debt of record<sup>d</sup>.

<sup>c</sup> Dalt. Sheriff. 55. 123.

<sup>d</sup> 11 Vin. Abr. 291.

And if a debt by specialty be assigned to the king, his prerogative does not attach upon it so as to entitle it to payment by the executor before bond or judgment creditors<sup>f</sup>. It is said also that rents due to the crown have only the rank of simple contract debts<sup>g</sup>. The forfeitures on some particular statutes come next to the debts to the crown by record; as the forfeiture for not burying in woollen by 30 Car. 2. c. 3. money due from the overseers of the poor by 17 Geo. 2. c. 38. s. 3. and to the post-office for letters by 9 Ann. c. 10. s. 30.

Next to the king's debts of record, with the exceptions above mentioned, debts due upon judgments (that is, upon judgments against the testator,—not the executor,) in all courts of record, or decrees in Equity<sup>h</sup>, are to be paid, whether such judgments be voluntary or *in invitum*. Nor is there any distinction between judgments actually entered up against the testator, and those which are entered up after his death, but which relate to a verdict obtained in his life-time, and are therefore to be regarded as if given in his life-time, under the stat. 17 Car. 2. c. 8., or those, which, being signed at any time during the term or the vacation immediately subsequent, relate back to the first day of the term by the common law, although the defendant died before the signing<sup>i</sup>. It seems, however, that a final judgment entered up against the testator after his death, grounded upon an interlocutory judgment obtained against him in his lifetime pursuant to the stat. 8. c. 9. Wm. 3. c. 11. being to be entered against the representative and

<sup>f</sup> 11 Vin. Abr. 301.

<sup>g</sup> 3 Bac. Abr. 80.

<sup>h</sup> 2 Fonbl. 412. n. (s)

<sup>i</sup> 6 T. Rep. 368. 7 T. R. 20.

not the intestate himself, cannot be pleaded by an administrator to an action brought against him on a bond<sup>k</sup>. Priority of judgments does not depend either upon the dignity of the court (provided it is a court of record,) or upon the original cause of action. It is of the same strength whether the debt was by simple contract or by speciality<sup>l</sup>.

Between judgments, priority of time is immaterial—the executor may satisfy which he pleases, unless a preference has been gained by a *scire facias* sued out upon the judgment. But if two judgment creditors take out, each of them, a *scire facias*, the executor may give a preference to that upon which the *scire facias* was last sued out, by confessing the action<sup>m</sup>. A judgment in a foreign country has the rank only of a simple contract debt<sup>n</sup>, and so it is with respect to a judgment not docketted according to the stat. 4 and 5 W. & M. c. 10°. In such a case the docketting is the only notice that the executor need attend to; but as the statute does not extend to judgments in inferior courts of record, the executor must take notice of them at his own peril<sup>o</sup>. There must be actual or implied notice of a decree to make an executor liable for not giving it its preference, and the only implied notice has been held to be the pendency of the suit<sup>p</sup>. But the executor must have his protection and indemnity for such payments under decrees against suits by the other creditors, by

<sup>k</sup> Com. Dig. Pleader, 2 D. 9.<sup>l</sup> 11 Vin. Abr. 299.<sup>m</sup> 11 Vin. Abr. 299.<sup>n</sup> 11 Vin. Abr. 291. Doug. 1.<sup>o</sup> 3 Bl. Com. 397. 6 T. Rep. 384. 1 Bos. and Pul. 307.<sup>p</sup> 3 P. Wms. 117.<sup>q</sup> 2 P. Wms. 482. 2 Fonbl. 156. not. (n.)

application to equity for an injunction<sup>†</sup>. Debts due upon recognizances, such as are usually entered into before a court of record, or magistrate duly authorised, to appear at the assizes, to keep the peace, to pay debts, &c. statutes merchant, statutes staple, and recognizances in the nature of statute staple (which last description of securities are now but little used) come next, and the date of them is immaterial, with respect to the payment.

Debts by specialty are next in rank to debts of record, as for rent, (whether such rent be reserved by lease in writing or by parol<sup>‡</sup>,) or on bonds, covenants, and other sealed instruments, and these debts are all, *inter se*, of equal dignity. The profits of the land leased are, in all cases, to be applied by the executor to the payment of the rent; and if they are insufficient to answer such rent, the residue is payable out of the general assets, as other debts by specialty. A bond, even before it is due, ranks before a simple contract debt, and the executor may plead the *existence* of such a bond, in defence to an action by a simple contract creditor<sup>§</sup>. But the executor ought not to pay the money upon a bond *not yet due* in preference to a bond-debt already due: and the liability upon a contingent security, before the contingency happens, shall not be admitted to delay the payment of a simple contract creditor<sup>||</sup>. Where the contingency has taken place, it is as if there had been no contingency at all<sup>¶</sup>.

Simple contract debts are to be preferred to bonds

<sup>†</sup> 3 P. Wms. 401. not. (F.)

<sup>‡</sup> 3 Bac. Abr. 82. 96.

<sup>§</sup> 11 Vin. Abr. 105.

<sup>||</sup> 3 Bac. Abr. 81.

<sup>¶</sup> 5 T. Rep. 307.

*merely voluntary* ; but such bonds are, nevertheless, to be satisfied before legacies<sup>7</sup>.

The next order of debts are those arising upon simple contract ; but it seems, that among debts of this description, the claims of the King are to be first satisfied<sup>8</sup> ; and, with that exception, the executor may prefer whom he pleases in the order of payment, among the creditors of this class, except that it has been said that the wages of servants are entitled to a preference. If an action be actually brought against an executor for a debt of the testator, a right is gained to the payment of that debt in preference to the other debts of the same degree (1). But if another creditor of the same class afterwards brings his action, and first recovers judgment, he must first be satisfied ; and the executor may accelerate such right by confessing judgment to the action latest brought<sup>9</sup>. Such confessed judgment, though entered after an interlocutory judgment obtained at the suit of another, shall stand before it in the order of payment<sup>10</sup>. But it has been very recently decided that the contrivance of an executor to extend this prefer-

<sup>7</sup> Ca. temp. Talb. 156. .

<sup>8</sup> 3 Bac. Abr. 80. in not.

<sup>9</sup> 11 Vin. Abr. 296. 1 P. Wms. 295.

<sup>10</sup> 2 Atk. 386.

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(1) It is true, that where an action is brought by a creditor of the testator against his executor, he is restrained from paying any other creditor in equal degree ; yet any of the creditors may file a bill in a court of equity against the executor for an account, in which case all the creditors may, as it seems, be compelled to take an equal distribution of the assets.



ence by confessing a judgment to one creditor as a trustee for many others, cannot be supported<sup>c</sup>. This power of preferring one creditor to another in equal degree, may, under particular circumstances, be exercised in furtherance of justice ; but the general duty of an executor is, certainly, to make an equal distribution among creditors in equal degree. Notice of a specialty debt obliges the executor to the payment thereof, before any debt of inferior degree ; nor is it material in what manner such notice comes to him. *Lis pendens* is always notice ; and of debts of record an executor is bound to take cognizance, provided they are docketted, where the statute requires it.

Without actual notice, or what the law considers as notice, the executor is justified in paying an inferior debt, although a superior debt should thereby go unsatisfied. But this should not be done with such precipitance as not to leave time to specialty creditors to give notice of their debts ; as unreasonable haste would be evidence of fraud. And it is to be observed that an executor acts illegally in confessing judgment to an action for an inferior debt, after notice of the existence of one of a higher description<sup>d</sup>.

An executor may retain out of the assets in his hands, the amount of a debt of his own, in preference to all the debts of other persons standing in equal degree ; but he has no such advantage against those whose debts are above his own in degree. If

<sup>c</sup> 1 M. and S. 395,

<sup>d</sup> 1 T. R. 690.

the same person is executor of both the obligor and obligee, or executor of the one and administrator of the other, he may retain, as the representative of the debtor, the amount of the debt owing to him, as representative of the creditor<sup>a</sup>. And this right of retention devolves to the executor of an executor<sup>f</sup>. A special executor or administrator, whose authority is limited as to time, or extends over only *a part* of the assets, possesses the same privilege *pro tanto*; and though an *executor de son tort* has no such right, yet if administration be granted to a creditor, and afterwards repealed at the suit of the next of kin, such creditor may, nevertheless, retain against the rightful administrator<sup>g</sup>. And if a creditor, being appointed executor with others, refuse to administer, he may sue the other executors for the debt<sup>h</sup>. If a surety in a bond be made the executor of his principal, and after his death is compelled to pay the bond debt, this does not give him a right to retain on the footing of a bond creditor on his testator's estate; but it has been said that it authorises him to retain in quality of a simple contract creditor<sup>i</sup>. But in all these cases it is to be remembered that an executor shall not be allowed to retain his own debt, to the prejudice of his co-executor in equal degree, but the assets shall go in discharge of both their debts in the same proportion<sup>k</sup>.

<sup>a</sup> 11 Vin. Abr. 261.

<sup>g</sup> 11 Vin. Abr. 265.

<sup>i</sup> Toll. Ex. 2d. Edit, 298.

<sup>f</sup> 11 Vin. Abr. 263.

<sup>h</sup> 11 Vin. Abr. 262.

<sup>k</sup> 11 Vin. Abr. 72.

## SECTION VIII.

*Of the Duty of Executors as to the payment of Legacies.\**

THE principal doctrines and decisions concerning legacies in general, are treated of in the former

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\* The great legacy act is the 36th Geo. 3. c. 52. which imposes the following duties upon legacies, and bequests of personal property, i. e. upon all legacies of 20*l.* and upwards, and upon all residuary bequests and shares of residues in case of intestacy, of 100*l.* and upwards.

Brother or sister, or their descendants,	2 per cent.
Uncle or aunt, &c.        -        -        -	3 per cent.
Great uncle, or great aunt, &c.        -	4 per cent.
Other persons,        -        -        -        -	6 per cent.

This act directs that the duties shall be managed by the Commissioners of Stamps.—The stamp act of the 44th of Geo. 3. c. 98. enacts that all former *duties*, under the care of the Commissioners of Stamps, shall cease, and in their stead imposes the following duties upon legacies and bequests out of the personal estate, of 20*l.* or more; and upon all residues and shares of residues of 100*l.* and upwards, i. e.

Brother or sister, &c.	£2 10 per cent.
Uncle or aunt, &c.        -        4        0	
Great uncle or aunt, &c.        5        0	
All other persons,        -        8        0	

By this act, the duties, &c. given by other acts are to cease, but no other parts of such acts are repealed, so that the new duties imposed by it are to be collected and managed in the same manner as the old duties. *The new legacy stamps* hereby imposed are, therefore, to be collected, managed and computed, by the Commissioners of Stamps, according to the direction of the 36th Geo. 3.

By the 45th Geo. 3. c. 28. a duty is imposed on legacies to children, &c. of 1 per cent. and a new duty of 10 per cent. in lega-

volume. This section will therefore be confined to the mere duty and office of the executor concerning them.

To the duty of the executor, every other claim under the will, as to the personal property of the tes-

cies to strangers, &c. instead of the duty of 8 per cent. by the 44th Geo. 3.

The duties imposed by this act, and by those of the 44th of Geo. 3. are likewise extended to bequests of monies arising from, or charged upon real estates, &c.

The 48th Geo. 3. c. 149. repeals the *duties* granted by the 44th and 45th Geo. 3. but with respect to legacies and residues, imposes the same again as they stood after the 45th Geo. 3. with very little variation.

The legacy duties, as they now stand, by the 48th Geo. 3. c. 149. are as follows :—

For children and their descendants,	-	-	£1	0	per cent.
Brother or sister, and their descendants,	-	-	2	10	
Uncle or aunt, and their descendants,	-	-	4	0	
Great uncle or great aunt, and their descendants,	5	0			
All other persons,	-	-	-	-	10 0

These duties are imposed upon all legacies of 20*l.* and upwards, either out of the personal or moveable estate, or out of or charged upon the real or heritable estate, or out of any monies to arise by sale, mortgage, or other disposition of the real estate, or any part thereof. Also for the clear residue (when devolving to one person) and for every share of the clear residue, (when devolving to two or more) whether arising from a testamentary disposition, or from a partial or total intestacy, where such residue shall be of the value of 20*l.* and upwards. And also for the clear residue (when given to one) and for every share of it, (when given to two) of the monies to arise from the sale, mortgage, or other disposition of the real estate, when of the value of 20*l.* and upwards.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, are to be deemed legacies within the intent and meaning of the schedule.

As to the necessity for the assent of the executor; and its effect.

tator, is subordinate. It is his duty to see that the fund is first applied to the satisfaction of the *creditors*. No legacy, therefore, takes effect in the legatee, until executed by the assent of the executor; but the assent of one of several executors is sufficient\*. The personal property devolves first upon him to fulfil his primary duty of paying the debts of his testator. And if, notwithstanding a deficiency of assets, he pays legacies, he makes himself responsi-

\* Com. Dig. Admon. (c. 8.)

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Out of this act, however, are excepted all legacies, residues, and shares of residues of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of the Royal Family.

And all legacies exempted from duty by an act of the 39th Geo. 3. c. 73. for exempting certain specific legacies given to bodies corporate or other public bodies, from payment of duty.

By the 3d section of this act, the new duties are to be under the management of the Commissioners of Stamps, &c. and they are empowered to employ such officers or persons under them, and to do all such other acts and things as shall be thought necessary for carrying the act into execution, in as full and ample a manner, as they or any former commissioners are or have been authorised to do, for the raising or collecting of any former stamp duties, or for putting into execution any act or acts of parliament relating thereto.

By sect. 8. the powers and provisions of former acts are to be put into execution with regard to duties under this act.

Cases of all persons dying, after the 5th April, 1805, where the legacies, &c. are paid after the 10th Oct. 1808, are included in this act.

A principal difference between this and former acts, with regard to the legacy duty is, that the duty imposed upon bequests of the residue, &c. is extended to all cases where the amount is 20*l.* and upwards. Whereas, in former statutes, the duty upon residuary bequests was only imposed where they amounted to 100*l.* and upwards.

ble to the extent of the legacies so paid to the creditors.

This assent of the executor is equally necessary, whether the legacy be general or specific. And if the legatee, in either case, takes the thing bequeathed, without such assent, he is liable thereby to an action of trespass by the executor. Even if the chattel be in the hands of the legatee at the time of the testator's death, he cannot retain it against the demand of the executor. If such legacy is payable out of the general funds of the testator, the law will not raise an implied promise on proof of an acknowledgment of assets, so as to enable the legatee to bring an action at law, the reasons of which rule are well expounded in *Deeks v. Strutt*<sup>b</sup>. But in the case of the bequest of a specific thing, the assent passes the legal title under the will<sup>c</sup>. The rule is the same, whether the subject of the bequest be a personal or real chattel. And the assent of the executor vests the term, or other specific thing bequeathed, in the legatee, from the death of the testator, by relation<sup>d</sup>.

Difference as to the effect of assent in the cases of general and specific legacies.

As this interest is vested in the executor for the sake only of other persons, it is compatible with an interest vested in the legatee, which, if he die before the executor's assent, passes to his personal representatives.

<sup>b</sup> 5 T. R. 690.

<sup>c</sup> *Doe d. Lord Saye and Sele v. Guy*, 3 East. 120. and see *Paramour v. Yardley*, Plowd. 539.

<sup>d</sup> *Saunders's Case*, 5 Rep. 12. b. *Chamberlain v. Chamberlain*, 1 Chan. Ca. 256. *Bastard v. Stukeley*, 2 Lev. 209. *Barton's Case*, 2 Freem. 289.

Even the release of a debt by the will of a creditor, and which operates by extinguishment rather than by donation, is so far in the nature of a legacy, that to be complete and effectual, it ought to have the executor's assent<sup>e</sup>. But in all cases, and in the last more especially, a slight expression, or demonstration of assent, is sufficient.

What  
amounts to  
an assent.

The assent of an executor may be inferred from his acts, and such constructive assent will be as available as an assent positively and expressly given. Any recognition of the property, or right of the legatee, amounts to an assent;—as if the executor, in any manner, deals with the legacy as the owner<sup>f</sup>. If a term of years be devised to one for life, remainder to another, the assent of the executor to the first devise, operates as an assent in favour of the remainder man<sup>g</sup>, and an assent to the remainder is an assent to the preceding estate; for, in legal consideration, they make together but one estate<sup>h</sup>. Nor can the executor give such assent, upon terms which subject it to be withdrawn upon any subsequent event; but he may impose a condition, precedent to the payment of the legacy, though he cannot encumber it with future stipulations: and whenever the assent is given, it must relate to the testator's death, and perfect the title of the legatee, *ab initio*. An assent to a devise for a lease for years, is also to be considered as an assent to all conditional springing or contingent interests, coupled with it by the devise<sup>i</sup>.

<sup>e</sup> 2 P. Wms. 332.

<sup>f</sup> 4 Bac. Abr. 445. 2 Vent. 358.

<sup>g</sup> 1 Roll. Abr. 620. Plow. 545. n.

<sup>h</sup> Com. Dig. Adm. (c. 6.)

<sup>i</sup> 1 Roll. Abr. 620.

Thus, an assent to the devise of a term in land, is an assent to rent or common, devised out of it<sup>k</sup>. Though it is said that if a man have a lease for years, and devise out of it a rent or common to A., and devise the lease itself to B., and die, and his executors pay the rent, or assent that A., the devisee of the common, shall put in his cattle and use the common, this is no assent that B. shall have the term, for they are distinct things<sup>l</sup>.

An assent by one named executor in a will is of no avail, unless he has attained the age of twenty-one years<sup>m</sup>; but, as we have seen, he may consent, before taking out probate.

If a power is given to an executor to divide money among children at his discretion, his disposition must not be unreasonable, and where a grossly unequal distribution, under such circumstances, has been made, equity has set it aside, and decreed an equal distribution<sup>n</sup>. An equal distribution may not, in some cases, be a reasonable distribution, and in one case the court decreed a double amount to one who stood in greater need of it than the other objects of the distributive bequest<sup>o</sup>. In the exercise of such discretionary authority the executor may vary the amount among the objects, but not in an illusory, or plainly inequitable manner<sup>p</sup>.

An assent to a void legacy must necessarily be itself Of the ex-  
ecutor's

<sup>k</sup> 1 Roll. Abr. 620.

<sup>l</sup> Plow. 521.

<sup>m</sup> Stat. 38 Geo. 3. c. 87.

<sup>n</sup> 4 Bac. Abr. 340. 2 Vez. 640.

<sup>o</sup> 2 Vern. 421.

<sup>p</sup> 5 Vez. Junr. 149. 7 id. 124. 9 id. 382.



execution  
of a legacy  
to himself.

void, upon the same principles as an attornment to a void grant is without effect in the law<sup>1</sup>. Where an executor is also a legatee his assent is necessary to vest the legacy in him in the capacity of legatee; and until he is acquainted with the competency of the assets he cannot claim it as such. If he enters or takes possession generally, without claim or demonstration of his election, it is said he shall have it as executor, and not as legatee<sup>2</sup>; and it follows upon principle, that an executor's execution of a legacy to himself, must operate as a confirmation of an ulterior interest in another person in the same thing<sup>3</sup>. His consent to his own legacy may, like his assent to the legacy given to another, be express or implied. His acting upon it in any manner as a legacy, and still more his declaration that he takes it as such, constitutes an assent effectual to render him a legatee<sup>4</sup>. And if a legacy is given to a man for his trouble in the execution of his office, he must either act in it, or shew his intention so to do, in order to become intitled to it<sup>5</sup>. And lastly, in the case of a devise to several executors, one of them may assent for his own part<sup>6</sup>.

Of the time  
of vesting.

To the proper discharge of this branch of an executor's duty, a knowledge of the rules and circumstances which have decided the important question when legacies and legatory portions are to be considered as vesting, and when and from what time interest is to be paid upon them, is very material. I

<sup>1</sup> Vin. Ab. tit. Devise, E. a. 2 pl. 2.

<sup>2</sup> Dy. 277. 1 Rol. Ab. 61. 10 Rep. 47. b.

<sup>3</sup> Paramour v. Yardley, Plow. 541.

<sup>4</sup> 1 Lev. 25. 1 Rol. Ab. 619. 920. Plow. 539. Dy. 277.

<sup>5</sup> 4 Vez. Jun. 212.

<sup>6</sup> 1 Roll. Abr. 618.

shall endeavour to state the effect of these determinations in the clearest manner, consistent with a convenient brevity.

It can scarcely be necessary to observe, that the year given to the executors for collecting the assets, does not prevent the vesting; and that consequently the money must be paid to the representative of the legatee, dying before the end of the year<sup>\*</sup>. Whenever a legacy is given, and the gift and time of payment are both future, as, if I give to A. B. a legacy of —*l.* at and when he comes of age, there the time is annexed to the gift and substance of the thing, and if the legatee die before he comes of age, the legacy lapses<sup>†</sup>.

A direction to pay interest upon legatory portions, where they are charged upon personalty, is always evidence of the vesting, for so it is always held in the Civil and Ecclesiastical Courts, from which the rules respecting legacies and legatory portions are drawn. But it is otherwise where the portion is provided by deed<sup>‡</sup>. With respect to all interests arising out of land, the general rule is, without regard to the question, whether the land be the primary, or only the secondary and auxiliary fund—or whether the charge be made by deed or will—or whether it be a portion, or a general legacy—or for a child or a stranger—or with or without interest—that charges upon land payable at a future day, shall not be ruised where the

<sup>\*</sup> 10 Vez. Jun. 13.

<sup>†</sup> 1 Eq. C. Abr. 295. 1 Vez. 48. 3 Atk. 101. 645. 1 Burr. 227. 3 Vez. Jun. 135. *Sansbury v. Read*, 12 Vez. Jun. 75. *Hixon v. Oliver*, 13 Vez. Jun. 108.

<sup>‡</sup> *Lord Teynham v. Webb*, 2 Vez. 207. *Herbert v. Parsons*, id. 263.

party dies before the day of payment. This is the *general* rule, but there are many exceptions; as where the time of payment is postponed from the circumstances not of the person but of the fund: thus where a legacy is charged on land, to be paid after the death of the testator's wife, there if the legatee die after the death of the testator, and before the death of the wife, the legacy goes to the representatives of the legatee<sup>a</sup>. But wherever a legacy charged on real property is given expressly with a view to the wants and occasions of the legatee at a particular time, as at 21, or marriage, if the legatee die before the time at which, according to the intention of the testator, the legacy would be wanted, it sinks into the land. And where the fund is mixed, the vesting may depend upon the question whether it was necessary to resort to the personal estate<sup>b</sup>.

Mr. Cox observes, in his note to the cases of the *Duke of Chandos v. Talbot*, that where portions have been given out of land, and no time of payment is expressed, the determinations are difficult to be reconciled; some considering them as presently vested, and others that they do not vest, if the legatees die before they want them. But perhaps the cases may be reconciled by adverting to this distinction, viz. that where no time is given, and interest is made payable, they vest immediately; and that where no time is expressed, and interest not given, they do not vest before 21, or marriage<sup>c</sup>. If the sum itself which is

<sup>a</sup> *Tnustal v. Bracken*, 1 Bro. C. R. 124. note; and *Ambl.* 167.

<sup>b</sup> 1 *Veaz.* Jun. 48. See the note to the case of the *Duke of Chandos v. Talbot*, 2 P. Wms. 612.

<sup>c</sup> 2 *Eq. C. Abr.* 248. *Ch. Ca.* 181. *Prec. in Ch.* 318. 3 *Atk.* 645.

to be paid at a future time is uncertain, it cannot vest in the interim<sup>d</sup>: and wherever payment is postponed till 21, though it may vest for some of the above-mentioned reasons; yet the representative cannot claim it, until the party, had he lived, would have been 21<sup>e</sup>.

A legacy given at a particular age may vest immediately on the death of testator, by force of the accompanying words, as where a trustee is appointed for the legatee during his minority<sup>f</sup>. But mere directions for maintenance do not, as it seems, avail to this purpose<sup>g</sup>.

To prevent a lapse of a legacy, a will should be specially penned<sup>h</sup>. Thus, where testatrix forgave a debt, and desired her executors to deliver up the bond to the debtor, it was held that it did not lapse by his death before testatrix<sup>i</sup>. And if a testator expressly directs that his legacies shall not lapse by the deaths of the legatees in his life-time, and then gives a legacy to B. his executors, and administrators, the legacy will not lapse though B. die in testator's life<sup>k</sup>. Where a legacy is given in consideration of paying an annuity, and the legatee dies in the testator's life-time, the annuity shall be a charge on the residuum, though the legacy lapsed<sup>l</sup>.

<sup>d</sup> Maddison v. Andrew, 1 Vez. 57.

<sup>e</sup> 2 Vern. 199. 2 Vent. 342.

<sup>f</sup> 6 Vez. Jun. 239. 7 Vez. Jun. 421.

<sup>g</sup> 2 Vez. 207, 262. 1 Burr. 227. 2 P. Wms. 612. note 1.

<sup>h</sup> 3 Atk. 572, 582. <sup>i</sup> 1 Vez. 219. 1 P. Wms. 83.

<sup>k</sup> 3 Atk. 572. 3 Bro. C. C. 224.

<sup>l</sup> Oke v. Heath, 1 Vez. 141.

Of abatement.

Where there is not enough to pay both the debts and legacies, the legacies must be reduced proportionably. In case of a deficiency, charity legacies must abate in proportion, and so must legacies given to executors for their trouble. Small gifts, indeed, to the poor of a parish have been considered as doles, and part of the funeral, and therefore exempt from this liability : but legacies to servants abate. Specific legacies do not abate with the pecuniary legacies, but if the debts require more than the sacrifice of the pecuniary legacies, they abate inter se. If one makes a will, and then a codicil, and gives legacies by both, on a deficiency they shall all come into average ; but if one gives legacies, and apprehending there will be a surplus, gives further legacies out of the surplus, by his will or codicil, the legacies first given shall have the preference<sup>m</sup>.

Of interest.

If a legacy be made payable on a certain day, and nothing is expressed about interest, it is a general rule that the interest shall commence only from the time it is payable, though the legacy may vest from the death of the testator, so as to be transmissible to the legatee's representatives, in case he dies before it is payable". If the legatee die before the time of payment, 'as if it be made payable to the legatee at twenty-one, and he die before twenty-one, his representative must wait till he would have attained twenty-one if he had lived, unless it were directed by the will to be paid with interest". Where no time is appointed for the payment of a legacy, it is not necessarily payable till the expiration of a year after the testator's death, that being the time allowed the

<sup>m</sup> Attorney General v. Robins, 2 P. Wms. 23.

<sup>n</sup> 2 P. Wms. 481. notes. 3 Vez. Jun. 10. 4 Vez. Jun. 1.

<sup>o</sup> 4 Vez. Jun. 345.

executor for getting in the effects; and therefore, in such a case, interest does not begin to be payable till the year is expired<sup>p</sup>. The old doctrine that the payment of interest should depend upon the funds' being productive or barren, is exploded; and now, although the testator's property consists of stock producing a certain and regular interest, yet if the will is silent about interest, none will arise upon a legacy given by him, till the end of the year after his death<sup>q</sup>.

This general rule of giving interest to the legatee, from the expiration of the year, is not to be extended or contracted upon slight inferences of intention; nor will it yield to the impossibility of getting in the personal estate, so as to pay the legacy within the year allowed for that purpose. And even though the legacy is to come out of a part of the testator's estate, which cannot be recovered for a long time after the year, and the testator directs the legacy to be paid, when the money, which is to constitute it, can be recovered; still the payment of interest, if practicable, or at least the computation of it, will commence from the end of the year after the testator's decease. The judgment of Sir W. Grant in the case of *Wood v. Penoyre*<sup>r</sup>, exhibits the law on this subject with so much clearness, that the reader will not be sorry to find it stated in this place.

Thomas Tolson by his will, dated the 9th of May, 1788, after payment of his debts, gave to the defendants Penoyre and Rood the sum of 6000*l.* secured to him with interest at 5*l.* per cent upon a mortgage of

<sup>p</sup> 2 P. Wms. 26, 27.

<sup>q</sup> 7 Vez. Jun. 97.

<sup>r</sup> 13 Vez. Jun. 325.

the estate of Sir Lucius O'Brien, in the county of Clare in Ireland, and all his legal and equitable interest in the said mortgage ; upon trust to carry on the suits depending in Ireland for recovering the said money, in case it should not have been paid in the testator's life ; and to pay and apply the said money, when recovered, in the manner hereinafter mentioned. The testator afterwards gave the following, among several other legacies :

“ Also, I give to my said trustees the sum of 2500*l.*  
“ to be paid within six months next after my decease ;  
“ and also the further sum of 2500*l.* to be paid out of  
“ the money due on the Irish mortgage when the  
“ same shall be recovered ;” upon trust to place out  
the said two sums upon government or other good securities, and pay the interest or dividends to the testator's niece Elizabeth Holland for life, for her separate use ; and after her decease to divide the trust-money among her younger children equally.

“ Also, I give and bequeath the several legacies to  
“ the several persons hereinafter-mentioned, (that is  
“ to say,) to my niece Elizabeth Wood, the sum of  
“ 100*l.* and to each of her four children 100*l.* to be  
“ paid as soon as may be after my decease ; and also  
“ to each of her said children the further sum of 900*l.*  
“ to be paid out of the money due on the Irish mort-  
“ gage when the same shall be recovered.”

A great number of legacies followed ; and then this clause ; “ and I direct that the legacies hereinbefore  
“ given to my servants, and all other legacies not ex-  
“ ceeding 100*l.* each shall be paid immediately after  
“ my decease, and the other legacies, with those given

“ to charitable uses, within six months next after my  
“ decease.”

### THE MASTER OF THE ROLLS.

My first impression upon this case certainly was, that the words “ where the same shall be recovered,” had the effect of postponing the time of payment, and consequently the right to interest, until the mortgage debt, out of which the legatees were payable, should have been actually received and got in. But upon farther consideration of the cases, applicable to this subject, I am satisfied, these words mean, and therefore ought to receive, a different construction.

Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due upon such securities is actually got in: but by a rule that has been adopted for the sake of general convenience, this court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Payment may in many instances be actually impracticable within that time; yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment. In the cases of *Entwistle v. Markland*, and *Sitwell v. Bernard*\*, it was determined that the reference by the testator to the time, at which his personal estate should be got in, does not, without the most plain and distinct indication of his intention, af-

\* 6 Vez. Jun. 520. and notes to the case.



fect the legal presumption, that the personal estate may be got in within a year from the testator's death. In both those cases all that the plaintiff was entitled to, according to the strict letter of the will, was to have an estate for life in such lands as should be purchased with the produce of the personal estate, when it should be received and got in. It was admitted on all sides in both those cases, that there were large portions of the personal estate, that could not by any diligence of the executors have been possibly reduced into possession within a year from the death of the testator; and yet it was held, that the whole for the purpose of the question then before the court was to be considered as having been reduced into possession at the end of the year from the testator's death; so as to entitle the tenant for life to interest upon the whole fund; as if it had been actually realized, and actually capable of being laid out in land.

These cases shew, that the actual delay of payment is not necessary, in order to found the claim of interest. If the executors in either of those cases had been called upon by the tenant for life to purchase an estate, in order that he might enter into the enjoyment and the receipt of the rents and profits, they would have had just the same answer to give, which the executors and trustees in this case say they would have given, if they had been called upon to pay, before the money due upon the mortgage was received: for they would have said in those cases respectively, it was impossible for them to purchase land; for they could not with due diligence have got in the personal estate, with which that land was to be purchased. So, the executors in this case say, the legatees could not have had their legacies, if a bill had been filed; as

the mortgage out of which they were payable, was not received. But it was held that the possibility of purchasing, in fact, does not determine the question, whether, according to the legal presumption the purchase might not have been made. So the possibility in this case does not determine, whether by legal presumption the mortgage might not have been called in within a year. I cannot, without rejecting the authority of those cases, hold, that the mortgage, though not actually capable of being called in, is not to be considered as having been got in within the year. Constructive receipt is held equivalent to actual receipt for the purchase of the right to interest. There is no doubt a testator may exclude the rule of the court, by plainly indicating an intention inconsistent with it; and in *Gaskell v. Harman*<sup>1</sup>, and *Elwin v. Elwin*<sup>2</sup>, it did seem to me, that the anxiously marked intention would have been completely disappointed, if in one of those cases I had taken the personal estate to have been received or ascertained; or, in the other, if I had held the real estate to have been sold, at any other period, than that at which those events respectively took place in fact. But in *Entwistle v. Markland*, and *Sitwell v. Bernard*, the court seems to have decided, that such words as “when received,” “when got in,” “when recovered,” “when laid out,” do not so clearly mark the intention as to preclude the application of the legal presumption; and I have found a case in *Ambler*, which, though it is not fully stated there, yet by the register’s book establishes the same principle. That case is *Hambling v. Lyster*<sup>3</sup>. From the register’s book I find that the executors in their answer

<sup>1</sup> 6 Vez. 159. 11 Vez. 489.<sup>2</sup> 8 Vez. 547.<sup>3</sup> Amb. 401.

stated, that they had laid a case before Mr. Wilbraham upon two questions: 1st, whether the receipt of the money, due upon the mortgage, by the testator himself, was an ademption of the legacies given out of it: 2dly, supposing those legacies not adeemed, whether the legatees had a lien upon the new securities in which the money received upon the mortgage had been laid out. Mr. Wilbraham's opinion was, that there was no ademption; but likewise, that the legatees had no right to follow the money laid out in the new securities. That was a material point; as it appeared, the estate was not sufficient for all the legacies. One question therefore was, whether those legatees were to abate with the general legatees, or were to be paid by preference out of the securities, upon which the money, that had been received by the testator, had been laid out. The Master of the Rolls agreed with Mr. Wilbraham upon the first point: but differed from him upon the second; for the decree says, that so much of the money, so compounded for, and received and placed out again by the testator, is still to be considered as a fund for the satisfaction of the plaintiff's legacies; and as the money, due upon two bonds specified, was the readiest for the plaintiff's satisfaction, that money was directed to be called in forthwith, and payment was decreed with interest from the end of one year after the testator's death, and costs were given out of the money so received; and, if the said money should not be got in, or should not be sufficient for the plaintiff's satisfaction, liberty was given to apply.

In consequence of Mr. Wilbraham's opinion, an apportionment had been made of the whole estate; and 32*l.* had been apportioned to the plaintiff for his

legacy of 100*l*. He refused to accept that; and was held entitled to satisfaction out of the specific security. Then, as the new securities were held to be substituted for the former, it is clear, all the words of the will must have been as applicable to the one as to the other; and the legatee could have no claim upon the one set of securities except in the same mode as he had a claim upon the other; that is,—to be paid out of the securities, when the money due upon them should be received, and the decree accordingly follows the words of the will “when received.” But that did not prevent interest running from the death, several years before it was received.

So the opinion of the court is, that the words “when received” did not suspend or postpone the right to interest.

Therefore, upon these authorities the legatees in this case are entitled to interest at the rate of 4 per cent from the death of the testator.

Where the legatee is the child of the testator, the court will order interest to commence immediately, although the legacy is payable at a future day; since a parent is bound by the law of nature to provide a present maintenance for his own child<sup>7</sup>; and it seems it was Lord Alvanley’s opinion, when Master of the Rolls, that illegitimate children were to be admitted to the same benefit<sup>8</sup>; though Lord Hardwicke held a contrary opinion, on the principle of law, which recognizes no relationship in such a child<sup>9</sup>. And Lord

*In favour of a child interest will commence immediately.*

*Who is a child within this privilege.*

<sup>7</sup> 3 Vez. Jun. 13. 3 Atk. 60. 102,

<sup>8</sup> 3 Vez. Jun. 12.

<sup>9</sup> 1 Vez. 310.

Eldon seemed to think that there ought to be something to shew that the testator means to put himself in loco parentis<sup>b</sup>. Lord Alvanley was also of opinion that a grandchild was to be comprised within the exception out of the above-mentioned general rule, and was to be put upon the same footing with a child in this respect<sup>c</sup>; and the court of chancery has in subsequent cases confirmed that opinion<sup>d</sup>. But this favour does not extend to a nephew<sup>e</sup>.

Where a legacy is left to an infant, payable at 21, and bequeathed over on his dying before that age, and his death happens before his arriving at that age, the accumulated interest shall go to the representative of the deceased, and not to the remainder man<sup>f</sup>. And where a father is living, and able to maintain his child, to whom a legacy is bequeathed, it has been held that the interest of the legacy shall not be applied to his maintenance during his nonage<sup>g</sup>; but where the father is incompetent to maintain his child, he shall be maintained out of the interest of his legacy, whether it be vested or contingent, and although the legacy be bequeathed over on the infant's dying before 21<sup>h</sup>.

When the occasion is very pressing, the court will sometimes break in upon the principal, but this

<sup>b</sup> 6 Vez. Jun. *Perry v. Whitehead*. and see 4 Vez. Jun. *De Mazar v. Pybus*.

<sup>c</sup> 3 Vez. Jun. 12.

<sup>d</sup> 5 Vez. Jun. 194.

<sup>e</sup> 5 Vez. Jun. 12.

<sup>f</sup> 2 P. Wms. 421. note 1. 1 Bro. C. R. 82. 335. 3 Atk. 59.

<sup>g</sup> 3 Atk. 60, 399.

<sup>h</sup> 3 Atk. 60. 2 P. Wms. 21., and see *Cas. Temp. Lord Redesdale, Ellis v. Ellis*, and note, and see also 3 Vez. Jun. 16. as to the wife in such cases.

is seldom and cautiously done<sup>1</sup>; and it seems this can on no account be done, if the legacy be devised over on the infant's dying before he comes of age<sup>2</sup>. whether legacies are charged on real or personal estate, it is become the established practice of the court to allow only 4 per cent. where no interest is directed by the will<sup>3</sup>; although the fund may produce more<sup>4</sup>.

If an annuity be given by a will without specification as to the times of payment, it shall commence in computation from the testator's death, and consequently the first payment shall be made at the expiration of the year after that event; but if a sum be directed to be placed out to produce an annuity, whether that is to be considered as a legacy payable at the end of the year, and to begin in computation only from that time, or as an annuity commencing from the testator's death, seems not to be fully settled<sup>5</sup>.

An executor used often to be embarrassed how to dispose of a legacy bequeathed to a minor. He runs a risk in paying it to the father, or any other relation of the infant, without the sanction of a court of equity<sup>6</sup>. But by the act of 36 Geo. 3. c. 52. s. 32. it is enacted, that where, by reason of the infancy of any legatee, the executor cannot pay the legacy, it shall be lawful for him to pay such legacy, after deducting the duty payable thereon, into the bank of

Where the legacy is to an infant, how to be paid.

<sup>1</sup> 4 Bac. Abr. 433. 3 Bro. C. R. 178. 2 P. Wms. 21. 1 Vern. 255.

<sup>2</sup> 4 Bac. Abr. 442.

<sup>3</sup> Sitwell v. Bernard, 6 Vez. Jun. 520.

<sup>4</sup> 4 Bac. Abr. 440. 2 Bro. C. R. 47. 3 Bro. C. R. 53. and see Sitwell v. Bernard, 6 Vez. Jun. 520. <sup>5</sup> 7 Vez. Jun. 96.

<sup>6</sup> 4 Bac. Abr. 429. 1 Eq. C. Abr. 300. 3 Bro. C. R. 96, 186. 4 Burn. Eccl. C. 321.

England, with the privity of the accountant-general of the court of chancery, to be placed to the account of the legatee, for payment of which the accountant-general shall give his certificate, on the production of the certificate of the commissioners of stamps that the duty thereon has been duly paid ; and such payment into the bank shall be a sufficient discharge for such legacy ; and when paid it shall be laid out by the accountant-general in the purchase of 3 per cent. consolidated annuities ; which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on application to the court of Chancery by petition, or motion, in a summary way. But the executor is not bound to pay the legacy into the bank till the expiration of a year after the testator's death.

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## SECTION IX.

### *Of Distribution by an Administrator.*

AS far as regards the collection of the effects, and the payment of the debts, of the deceased, the office of the administrator corresponds with that of the executor. And if there be a will without the appointment of an executor, then the administrator with the will annexed, of whom mention has before been made, is in the place of an executor, and has the same duty to perform in respect to the legatees. But for the

duties of an administrator, appointed by the ordinary, in respect to the surplus property of an intestate, after the funeral, and testamentary charges and debts are discharged, we must look to the several positive provisions of the legislature, by which the distribution thereof has been directed and regulated.

The distribution, according to the statute, should be in the manner following : “ One third part to the wife of the intestate, and all the residue by equal portions among his children, and such persons as legally represent such children, in case any of them be then dead, other than such child or children (not being heir at law,) as shall have any estate by the settlement of the intestate, or shall have been advanced by him in his life-time, by portion, equal to the share, which shall by such distribution be allotted to the other children, to whom such distribution is to be made ; and in case any child (other than the heir at law,) shall have any estate, by settlement from the intestate, or shall have been advanced by him in his life-time by portion, not equal to the share which will be due to the other children by the distribution ; then so much of the surplusage shall be distributed to such child as shall have any land by settlement from the intestate, or was advanced in the life-time of the intestate, as shall make the estate to be equal, as near as can be estimated ; but the heir at law, notwithstanding any land that he shall have by descent, or otherwise, from the intestate, is to have an equal part in the distribution, with the rest of the children, without any consideration of the value of such land. But in case there shall be no children, nor any legal representatives of them, one *moiety* of the estate shall be allotted to the wife of the intestate, and the residue of

Distribution under the statutes of distribution.



the same shall be distributed equally among every of his next of kindred, who are in equal degree, and those who legally represent them.

No representations shall be admitted among collaterals, after brothers' and sisters' children : and if there be no wife, then all the estate shall be distributed equally among the children ; and if no child, then among the next of kindred to the intestate, in equal degree, and their legal representatives." For the benefit of creditors, no such distribution of the goods of an intestate shall be made, till after the expiration of one year from his death. And every one, to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties, in the spiritual court, that if any debt, truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case he shall refund, and pay back to the administrator, his rateable part of that debt, and of the costs of suit, and charges of the administrator, by reason of such debt, out of the part and share so allotted to him, thereby to enable the administrator to pay and satisfy the debt, so discovered after the distribution made.

The statute contains exceptions expressly saving the customs of the city of London, and the province of York.

Posthumous children, and those of the half blood, equally entitled.

Posthumous children are equally intitled with those born in the life-time of the intestate. And no difference is made between the half and the whole blood, but they are equally entitled, as being of equal propinquity to the deceased ; and if there be but one

child and a widow left by the intestate, the widow takes her third, and the other two thirds will go to the child; and if no widow, then the one child will take the whole. If all the children be dead, the children which they or any of them may have left, will take equal shares, as next of kin, in their own right, and not by way of representation. But if some of the children be living, and others dead, leaving children, the children of the deceased child take the share of their respective parents, by representation, and not in their own right; thus, if A. have three sons, B., C., and D., and B. die, leaving four children, and C. die, leaving two children, on the death of A. intestate, one third will go to D. another third to the four children of B. and the remaining third to the two children of C.

It is plain, under this statute, that the younger child cannot take any benefit of the distribution, unless he first bring into the general mass of the testator's property whatever estate in land or pecuniary portion he has received from the intestate, in his life-time, by way of advancement, by settlement, or otherwise; and this is called bringing the same into hotchpot, from which obligation, however, the heir at law is specially exempted. The advancement of a child so brought into hotchpot, is for the benefit of the children only, exclusively of the widow<sup>a</sup>. And it is to be observed, that if a child, after receiving such advancement, shall die in his father's life-time, the representative title of the grandchildren cannot be enforced, unless they first bring in the advancement of their parent<sup>b</sup>. Though the heir at law shall not account

Of advancement and bringing into hotchpot.

<sup>a</sup> Prec. in Chan. 182.

<sup>b</sup> 2 P. Wms. 560.

Of the privilege of the heir in this respect.

for the land, which came to him by descent, or otherwise, from the intestate; yet any advancement out of the personal estate, (1) must be brought in by him, as well as the other children, before he can be entitled to a distribution, under the statute<sup>c</sup>; and the same obligation extends to coheiressees<sup>d</sup>.

Every species of substantial provision is within the meaning of advancement under the statute, as the purchase of an advowson, or any office or commission<sup>e</sup>, the settlement or gift of a marriage portion, lands or interest in lands<sup>f</sup>, annuities, reversions, and gifts in futuro<sup>g</sup>, or on contingency<sup>h</sup>, (such being capable of a valuation,) and even provisions which are not to take place in the father's lifetime<sup>i</sup>.

But the advancement must be by an act in the lifetime, complete as to the property, though it may not take effect, or be intended to take effect, till after the death of the intestate. A provision therefore by will where a testator dies intestate, as to part of his personal estate, is not considered an advancement with respect to that part<sup>k</sup>. Neither is land given by the father's *will*<sup>l</sup> to a younger child, or what a child de-

<sup>c</sup> Fitzg. 285.

<sup>d</sup> 2 P. Wms. 240.

<sup>e</sup> 3 P. Wms. 317. not. (o)

<sup>f</sup> 2 P. Wms. 441.

<sup>g</sup> 2 P. Wms. 445.

<sup>h</sup> 2 P. Wms. 442.

<sup>i</sup> 2 P. Wms. 440.

<sup>k</sup> 2 P. Wms. 240.

<sup>l</sup> *Id.* *ibid.*

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(1) The bequest of a shilling to an eldest son, in satisfaction of all claims, was decreed sufficient to exclude him from his distributory share of the testator's personal estate, not disposed of. *Acherley v. Vernon*, 10. Mod. 524.

rives under his *mother*<sup>m</sup>, to be considered as an advancement within the meaning of the statute.

It is scarcely necessary to say that the property given to a child by any other than his parent, or what he shall acquire for himself, does not come under the description of advancement. Lands descended to the heir at law, or to the heir in Borough English, are privileged from being brought into hotch-pot; for the statute speaks only of such estate as a child has by settlement, or by advancement of the intestate in his lifetime<sup>n</sup>.

The title to take as next of kin under the statute, is to be traced by the same rules of consanguinity as the title to administration. In case, therefore, of no children, nor any issue of children, the father becomes entitled to all the surplus in exclusion of the brothers and sisters of the deceased: but the *mother*, by the statute 1 Jac. 2. c. 17. s. 7. comes in only with the brothers and sisters, each of them being entitled to an equal share with her. If, therefore, the intestate have left a widow, a mother, and brothers and sisters, the widow is entitled to a moiety, and the residue is equally shared between *the mother* and the brothers and sisters of the deceased; and in case any deceased brother or sister have left children, such issue will take the share their parent would have been entitled to if living. But representation, under the statute of distributions, is restricted among collaterals to the children of the brothers and sisters *of the testator*. It has, therefore, been held, that if an intestate leave an uncle and the child of a deceased aunt, the sister of

Of the title of the father and mother of the intestate.

<sup>m</sup> 2 P. Wms. 356.

<sup>n</sup> Cas. Temp. Talbot, 276.

the uncle, such child shall have no distributive share with the uncle\*.

Grandfathers, and grandmothers, uncles, aunts, nephews, and nieces.

Grandfathers and grandmothers, though in equal degree of consanguinity with brothers and sisters, shall have no share with them in the distribution<sup>p</sup>, but come next in order; and next to them are the uncles and nephews, aunts and nieces, who are all in equal degree, and take per capita: and it is to be observed, that dignity of blood makes no difference in these titles; so that where the next of kindred are a grandfather or grandmother by the father's side, and grandfather or grandmother by the mother's side, their claims are equally respected<sup>q</sup>.

Of the vesting of the distributive share.

The statute suspends the distribution till a year after the death of the intestate; but this is no suspension of the vesting in the next of kin, who have survived the intestate, so that if any such die before the year, their representatives are entitled to their distributive shares<sup>r</sup>.

Where a bastard dies intestate.

As a bastard can have no kindred, his effects, on his dying without a will, belong to the king, who, on proper application, usually grants them, by letters patent to the nearest natural connection; upon the strength of which such persons obtain, as of course, a grant of administration from the Ecclesiastical Court, which entitles him to the sole enjoyment of the personal property<sup>s</sup>.

The distribution of an intestate's effects is regu-

\* 1 P. Wms. 594.

<sup>p</sup> Amb. 191.

<sup>q</sup> 1 P. Wms. 53.

<sup>r</sup> 3 Bac. Abr. 75.

<sup>s</sup> Dougl. 542.

lated by the law of that country which may be properly called his home or domicile ; but the actual place where he happens to be at the time of his death, though presumptively his domicile, may, by circumstances be shewn not to be so ; for an occasional or temporary residence will not constitute such domicile so as to subject his property to the local laws with respect to its distribution<sup>t</sup>.

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## SECTION X.

*Of Distribution by the Custom of London.*

THE restraints which these customs formerly imposed upon the *testamentary power* have been removed by several statutes ; yet as to the property of an intestate they remain in full operation. If a freeman of the city of London die, (and it is of no consequence where, or whether he resided or left any property within the city,) leaving a widow and children, (although such children were not born in the city,) his personal property, after deducting the widow's apparel and the furniture of her bed-chamber, (1) which is called the widow's chamber, is divided into three parts, one of which belongs to the widow, another to the children,

<sup>t</sup> Amb. 25. 415, 416. 2 Vez. Jun. 198.

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(1) If the intestate's property exceed 2000*l.* it is said the widow is entitled to 50*l.*

Of the  
dead man's  
part.

and the third to the administrator, *in that character*. If there is only a widow, or only children, they respectively take one moiety, and the administrator the other<sup>a</sup>; if neither widow nor children, the administrator takes the whole<sup>b</sup>. That which belongs to the administrator is called the dead man's part, because formerly it was to be expended in masses for the soul of the deceased; but by the stat. 1 Jac. II. c. 17. the administrator's part has been made subject to be distributed, as in the common cases. The custom has nothing to do with the next of kin, but is confined to the wife and children of the intestate, not even extending to his grandchildren<sup>c</sup>. And a posthumous child takes together with the other children<sup>d</sup>. If therefore a freeman die, leaving a widow and grandchildren only, the widow takes her half by the custom, and the other half is to be distributed under the statute, in the proportion of one-third to the widow, and two-thirds to the grandchildren, as the lineal representatives of the deceased children. And if there be nobody within the purview of the custom, as if there be neither wife nor child, the whole will be distributed under the statute.

Of the wi-  
dow's  
chamber.

The privilege of the widow's chamber, like the right to paraphernalia, is postponed to the rights of creditors. A woman may be deprived of all these rights, whether under the custom or under the statute, by an express exclusion in her marriage settlement<sup>e</sup>; or by a divorce in the Ecclesiastical Court for adultery<sup>f</sup>. The share of a child, where the intestate has

<sup>a</sup> 1 P. Wms. 340.

<sup>b</sup> 2 Show. 175.

<sup>c</sup> 1 P. Wms. 541.

<sup>d</sup> Prec. in Ch. 499.

<sup>e</sup> 1 Eq. C. Ab. 153. 1 P. Wms. 531.

<sup>f</sup> Bunb. 16.

left other children, under the custom, *does not vest* until the age of 21; so that he cannot dispose of it by will until that age: and if after that age he dies intestate it goes according to the statute. If he die under that age his share survives to the other children<sup>c</sup>; differing in this respect from the share under the statute, which vests in the children upon the death of the intestate, and which they are competent to devise by their wills at the period when the general disposing capacity arrives.

Of the vesting under the custom.

What has already survived under the custom, does not survive again, but will go according to the statute<sup>b</sup>. Where there is but *one* child, his orphanage part vests in him upon the death of the intestate, and may be devised by him at the same age at which he is competent to dispose of personal property by will<sup>d</sup>. And it is said that if an orphan daughter marries under 21, her orphanage share is prevented from surviving if she dies under that age<sup>e</sup>. If a freeman have one or more children, and he advances him, her or them or any of them, in his lifetime to the full extent to which the benefit under the custom would extend, the custom so far is satisfied, but the widow may still take her customary share, and the rest is distributed according to the statute<sup>f</sup>. But if the advancement is only in part, such advanced portion must be brought into hotchpot before any advantage can be taken under the custom. Such portion, however, is only shared with the other brothers and sisters, this rule of equality not extending to the benefit of the widow<sup>g</sup>. And

Of advancement under the statute.

<sup>a</sup> Prec. Ch. 537.

<sup>b</sup> Prec. Ch. 537.

<sup>c</sup> Prec. Ch. 207.

<sup>d</sup> 1 Vern. 88.

<sup>e</sup> 2 P. Wms. 527. 1 Atk. 54.

<sup>f</sup> 1 Vern. 345.



if there be an only child so partially advanced, he shall take under the custom his full orphanage part, without accounting with the widow for his advancement<sup>a</sup>.

Where the portion so advanced exceeds the child's share under the custom, it seems settled, that after covering the orphanage part, to which *it is first applicable*, such excess ought to be brought into hotchpot, with all the persons entitled under the statute to the distributable part; except, it is said, where the advancement has been *given and accepted expressly* in satisfaction of the customary share, in which case, in the distribution of the dead man's part, no regard is to be had to the advancement, it being considered as a sort of purchase by the child<sup>b</sup>.

The advancement must be wholly out of the personal estate: the custom takes no notice of real property: therefore, a settlement by a freeman of real estate on his child, will not affect his right under the custom<sup>c</sup>; even though it be made in express exclusion thereof; and money given to be laid out in land is considered as real estate to this purpose<sup>d</sup>. The provision must always come from the father; it must be made by him in his *life-time*, and be out of his *personal* property<sup>e</sup>. Nor will every gift by the father so operate. Monies applied in maintenance and education, and perhaps in putting out apprentice, are not considered in the light of advancements, under the custom, any more than under the statute, though the last mentioned case is questionable<sup>f</sup>.

<sup>a</sup> 2 Salk. 426.

<sup>b</sup> 4 Burn's Ecc. L. 207.

<sup>c</sup> 1 Vern. 2. 216.

<sup>d</sup> 1 Vern. 345.

<sup>e</sup> 1 Vern. 61. 89.

<sup>f</sup> 1 Atk. 403.

We have observed, that if a child be advanced above his or her share under the custom, whether such excess shall be brought into hotchpot or not, will depend upon the question, whether the provision was or was not expressly made in satisfaction of the orphanage part. If made expressly in satisfaction of the orphanage part, it would be regarded as a sort of purchase; for it might have been less by the event. It is accordingly held, that if, upon the marriage of a freeman's daughter, at 21, the father settles a provision upon her, which she accepts in lieu of her orphanage part, equity will give effect to such agreement against the custom<sup>1</sup>. And if a man marry a freeman's daughter under age, he may release, or covenant to release, all future interest, in right of his wife, under the custom of London<sup>2</sup>.

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## SECTION XI.

### *Of the Distribution by the Custom of York.*

THE custom of York agrees with that of London, except in the following particulars. The orphanage part vests in the child immediately on the death of the intestate<sup>3</sup>, instead of waiting for the age of 21: Real

<sup>1</sup> 2 Eq. Ca. Abr. 272.

<sup>2</sup> 1 Atk. 63.

<sup>3</sup> 4 Burn's Ecc. L. 398.

estate, however small the value, in comparison of the personal estate, if it comes by descent, or by limitation in a settlement made on the father's marriage, and whether in fee or in tail, in possession or reversion, excludes the claim to the filial portion, under the custom<sup>b</sup>. It is to be observed also, that the custom of York will not attach, unless the intestate was resident within the province at the time of his death; but as this is not necessary under the custom of London, this latter custom controuls that of York, so that if a freeman of London die in the province of York, no inheritance in land shall preclude him from his share of the personal estate, by the custom of the city, which always follows the person<sup>c</sup>. Under both customs the locality of the property is immaterial.

For the convenience of the reader, an hypothetical list of cases, shortly stated and answered on this subject, shall be laid before him, which, with a little attention, may enable him at once to see the interests of parties, under the statute, and the custom above treated of, either distinctly considered, or in combination.

By the statute of distributions, 22 and 23 Car. 2. made perpetual by 1 Jac. 2. c. 17. the custom is saved, as well as to London and other places. These statutes work a distribution of the *pars rationabilis*, or, as they call it in the province of York, *the death's part*; in every other respect the custom remains unaltered.

<sup>b</sup> 4 Burn's Ecc. L. 409.

<sup>c</sup> 4 Burn's Ecc. L. 416.

**By the custom of the province of York:**

The death's } When a wife and children. } Third  
part. }

When children and no wife,  
wife and no children, wife  
and heir, wife and co-heirs, } moiety.  
wife and all advanced

When neither wife nor child-  
ren, altho' grandchildren; no  
wife, and an only child, heir,  
or children, co-heirs, or all  
advanced - - - The whole.

Widow's } When a child or children, } Third  
part. } not heirs - - - }

When a child or children,  
heirs, no children, a child } moiety.  
advanced, all advanced }

Child or children's part.—No widow,  
another child, heir, or ad- } moiety.  
vanced, all the rest advanced }

The heir at law has no share, by virtue of the cus-  
tom, but has a share of that part of the estate of his fa-  
ther, dying intestate, called the death's part, accord-  
ing to the statute aforesaid.

**Children advanced.** All the children advanced in  
the father's life-time are excluded by the same cus-  
tom; and also by the statute, save when there are no

other children ; in which case they each respectively succeed as next of kin.

And observe that the said custom hath relation to, and doth respect, only widows and children.

The widow of an intestate succeeds both to her widow's part in the thirds, or moiety of the clear surplus, according to the custom ; and also to her thirds, or moiety of the death's part, according to the statute ; and this she demands in the first place, and before the children can make any claim whatsoever.

The remainder of the death's part is by the same statute distributed amongst the children, the heir included, and in part advanced. And the remaining third, called the child or children's part, is by the same custom equally to be divided amongst them, excluding the heir. But the child in part advanced, claiming out of the last mentioned part his equal share, may throw in what he has received in part, and then the whole is equally to be divided.

N. B. The half blood is intitled to the same shares and privileges as the whole blood, in all the cases following, without any distinction.

### CASES.

Case of an intestate's leaving a widow, child, or children, none advanced, and no heir.

One third is allotted to her as her widow's part, share, or thirds, due to her by virtue of the custom of the province aforesaid ; another third is due to children, equally to be divided amongst them, as their filial parts, and child's portions by the same custom ; and the third and last remaining part, commonly called the death's part, is to be distributed according as the

said statutes do direct, viz, one third to the widow, and the remaining two thirds to the said child, or amongst the said children.

One third is due to the widow, by the said custom, one third to the children, the heir being excluded by the said custom, from claiming any share; but the remaining third is to be divided in manner following, viz. one third to the widow, the rest among the children, including the heir, by virtue of the statute.

Widow,  
children,  
heir.

A moiety due to the widow by virtue of the custom, remaining moiety one-third to the widow, the rest to the child by virtue of the statutes aforesaid.

A widow,  
and a child  
being an  
heir.

A moiety is due to the widow as her share by the custom; of the remaining part one third to the widow, and the rest among the co-heiresses.

Widow,  
three  
daughters  
co-heir-  
esses.

One third of the whole is due to the widow as her share by the custom; and further, one third of the death's part by the statute, and as to the rest the child in part advanced, must put what he has received in hotch-pot and then the whole is to be equally divided between them.

Widow,  
one child  
unad-  
vanced,  
one in  
part ad-  
vanced.

A third is due to the widow by the custom, and further one third of the death's part, all the rest is the child's.

Widow,  
one in part  
advanced,

Half to the widow, of the remainder, one third to the widow, the rest to the child.

Widow,  
one ad-  
vanced.

One third is due to the widow by the custom, and one third more as her third of the death's part, the re-

Widow,  
one unad-  
vanced &

one in part  
advanced,  
an heir.

mainder of the death's part is equally to be divided among all the children, whereof the heir is to be one, according to the statute ; as to the remaining third part of the whole, called the children's part, the child in part advanced must put what he has received into hotch-pot, and then the whole is equally to be divided amongst them ; the heir being excluded from this part according to the custom of the province.

Widow,  
one in part  
advanced,  
and heir.

One third is due to the widow by the custom, and further one third of the death's part ; the remainder of the death's part to be divided equally between the children, by virtue of the statute ; but as to the child or children's part, the heir having no title to it, it is all due to the child though in part advanced.

Widow,  
one unad-  
vanced  
one in part  
advanced,  
heir and  
grand-  
children.

The widow must first have one third of the whole clear residue, and further one third part of the death's part, according to the statute ; the remainder of the death's part is also distributed by the said statute amongst the children, heir, and grandchildren, in four parts, in manner following, viz. one fourth to the child unadvanced, one fourth to the child in part advanced, one fourth to the heir, and one fourth to the grandchildren, as representatives of their father. But as to the remaining third, called the children's customary part, the child in part advanced may put thereto what he has received ; and then the whole must be equally divided between the unadvanced and the in part advanced children, (the heir and grandchildren having no right by the custom,) and the advanced are always excluded ; yet the heir, though advanced, has a share in the death's part.

Widow &

A moiety is due to the widow by custom, half the

remaining moiety to the said widow, and the rest grandchildren.  
among the grandchildren, as next of kin by the statute.

Half is to go to the widow, and half the remaining Widow & no children  
half to the widow, the rest to the next of kin, all  
equally amongst them, viz. a moiety as their due share  
by the custom, and the remainder of the death's part  
to be distributed in like manner, by act of parliament.

One moiety amongst them equally to be divided as Children and no widow.  
their share, due by the custom, (excluding the heir,)  
the remaining part being the death's part, is to be di-  
vided in like manner, including the heir, by virtue of  
the statute.

All to him or her as next of kin.

One child  
and no  
widow.

One moiety to the child unadvanced, as his cus-  
tomary share; the remaining moiety equally to be  
divided between them by the statute. -

One child  
unadvanced  
and an  
heir.

All to the heir, the advanced having had his full  
share, and therefore excluded, both by the statute and  
the custom. One ad-  
vanced,  
and heir.

All to the unadvanced, for the reasons aforesaid.

One ad-  
vanced, &  
one unad-  
vanced.

All to the one in part advanced.

One ad-  
vanced  
and one in  
part ad-  
vanced.

All must be put in hotch-pot, and equally distri-  
buted between them.

One in part  
advanced,  
& 2 unad-  
vanced.

A moiety, being the child or children's part, is due Heir, and



**one in part advanced.** to the child, although in part advanced, (the heir having no title to the children's part, by the custom,) but the other moiety being the death's part, is equally to be divided between them by the statute.

**Heir, one in part advanced, & one unadvanced.** One moiety is the child or children's part, by the custom, (excluding the heir,) but he in part advanced must put what he has into hotch-pot and then the said child's part must be divided between them, and the other part being the death's part, must be equally divided amongst them, including the heir, by virtue of the statute.

**Three daughters, coheiresses** Equally amongst them, by virtue of the statute.

**One child, heir, & unadvanced.** All to him as next of kin.

**Three coheiresses, one being advanced.** All must be equally divided between them, without any consideration had of the advancement by the statute.

**A daughter, grandchildren, by a son, (the heir) advanced.** A moiety is due to the daughter by the custom, and the other moiety being the death's part, is distributed by the statute, viz. one moiety to the said daughter, the rest to the grandchildren, as representatives of their father.

**Father.** All to him as next of kin,

**Mother.** In like manner.

**Mother, brother, and sister.** All equally amongst them share and share alike by the statute.

All equally amongst them, but the children are to have shares according to their several stocks or branches from which they are descended.

Brothers & sisters, and brothers' and sisters' children.

All equally amongst them, (per capita) they being in equal degree of kindred.

Brothers' and sisters' children.

All to him or her, there being neither widow, children, father, mother, brother, sister, or their children.

Grandfather or grandmother.

Equally amongst them, as next of kin.

Grandchildren.

In like manner.

Uncles and aunts.

In like manner.

Cousins german.

The custom of London is the same, unless in a case where the eldest son has lands by descent, or by limitation in his father's marriage-settlement, which by that custom is no advancement.

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## SECTION XII.

### *Of the Liabilities, Dangers, and Defaults of Executors.*

IT is needless to enumerate among the instances of misconduct in an executor plain acts of embezzling, or consuming his testator's property. The law makes

him also liable in his own property for numerous other less direct modes of wasting the effects entrusted to him. As if he pays debts out of their order, or pays legacies without reserving sufficient to satisfy creditors; or releases the debts of the testator without a satisfaction; or changes the securities for debts; or reduces the estate by submitting to arbitration; or releases an action commenced; or incurs a charge of interest, by delay in the payment of a debt, where he had assets to answer it; or loses the property; or trusts it to an agent who embezzles it; or keeps money in an unproductive state for a length of time; or sells the property much below the value; or delays selling it till it is spoiled or injured, without reasonable excuse for the delay.

But the law attaches to the office of executor a reasonable degree of discretion, without embarrassing it with an unreasonable degree of responsibility. If he invests money in the funds, he will not be answerable on the fall of the stock<sup>a</sup>. He may also call in a debt bearing interest, if he has reason to apprehend the principal to be in danger<sup>b</sup>.

He may appropriate the goods of his testator to the amount of what he has expended on account of the testator<sup>c</sup>. And when it has been ultimately for the benefit of the property he has been allowed monies given or released by which an apparent and immediate loss has been incurred<sup>d</sup>.

Neither will an executor be charged with the de-

<sup>a</sup> 3 Bro. C.C. 147. 433.

<sup>b</sup> 1 P. Wms. 141.

<sup>c</sup> Dy. 187. b. Plowd. 185.

<sup>d</sup> 3 P. Wms. 380.

fault or misconduct of his companion, if he has not been concerned in it, or contributed to it in any way. But if two executors join in a receipt, and one only receive the money, the general rule is, that both shall be held answerable. (1) Upon this rule, however, the following distinction seems to prevail ;—that the act of participation which is to involve one executor in the consequences of his companion's default, must be such as helped him to the commission of it. If, therefore, an executor does an act, by which money gets into the possession of another executor, he is equally answerable with the other, however innocently he may have conducted himself; not so, however, if he is merely passive by not obstructing the other in receiving it. And where an executor receives the money without the consent of his co-executors, and they afterwards join in the receipt for the same, this posterior act, as it did not enable the defaulter to obtain the money, will not, it is said, render them answerable\*. Upon the whole, an executor is only liable for waste or loss by his co-executor, to the extent of the assets in his hands, unless he has been in any way accessory to the loss or default; nor will one executor be affected by the notice which another has had, and concealed from him<sup>f</sup>.

In what acts of his co-executor, an executor is implicated.

\* 1 P. Wms. n. 1. Ambl. 417. 4 Vez. Jun. 596.

<sup>f</sup> Cro. Car. 603.

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(1) 1 P. Wms. 81. 243. 2 Bro. C. R. 116. 117. and note a difference in this respect between co-executors and co-trustees, among which latter, only the hand that actually receives incurs the responsibility, though all join in the receipt.

If an executor receives money as such, and deposits it bona fide with his co-executor who is a banker of reputation, he shall not be charged with the loss in case of a failure of such banker<sup>a</sup>. And where a co-executor who had proved the will, but never acted in the office, received a bill on account of the estate by the post, and transmitted it immediately to the *acting* executor, he was held not answerable<sup>b</sup>.

Of carrying on the testator's trade with the assets.

The case of the executor's carrying on trade with the testator's assets may be considered under two aspects, namely, his carrying it on with the express authority of the testator given by the will, and his carrying it on without such authority. If he carries it on under such express authority, the testator's assets, as well as the property of the executor himself, will be subject to the bankruptcy; but, as between the executor and the testator's estate, his own property will be liable to make good any loss by such trading, though, if the trade turns out to be profitable, the benefit is wholly applicable to the purposes of the will. (2)

<sup>a</sup> 7 Vez. Jun. 197.

<sup>b</sup> 2 Vez. Jun. 678. and see *Bacon v. Bacon*, 5 Vez. Jun. 331. for cases of excusable loss by executors.

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(2) It has been lately held where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of the partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profit and loss of the trade, carried the same

But the testator's assets are not liable, nor will they pass by the assignment of the commissioners where they are specifically distinguishable, if the executor has carried on the testator's trade without any authority from him. And where under these circumstances the testator's assets are not specifically distinguishable, not only the creditors but the legatees of the testator will be let in to prove their demands to the extent of the assets so wasted by the executor in carrying on the trade<sup>1</sup>. If the testator restrict the power of carrying on his trade to a certain part or portion of the assets, specifically distinguishable from the residue, only such assets will be subject to the bankruptcy, while the *whole* of the executor's own property will still be liable<sup>2</sup>. What shall constitute a trading must depend upon the particular construction of the bankrupt laws.

Of the consequences of bankruptcy, where the testator's trade is carried on by the executor.

An executor's bankruptcy will not involve his right to act as executor, though for the safety of the property the court of chancery will upon proper application appoint a receiver; and where the assignees of such bankrupt executor have received a part of the monies belonging to the testator's estate, it will direct the bankrupt to be received in his character of executor as a proving creditor against his own estate, but will order the dividend to be paid into the bank<sup>3</sup>.

<sup>1</sup> 10 Vez. Jun. 110. *ex parte* Garland.

<sup>2</sup> 10 Vez. Jun. 110.

<sup>3</sup> 1 Atk. 101. 213. 2 P. Wms. 546.

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to the account of the infant. *Wightman v. Townroe*, 1 M. and S. 412. They are the legal proprietors in respect of every thing belonging to the trade, and consequently are liable to the legal debts. *Ibid.* per Bailey J.

The executor of an executor is liable, as such, for the waste committed by his immediate testator.

The statute 4 and 5 W. and M. c. 24. s. 12. enacts, that an executor of an executor shall be liable as such for the waste committed by his immediate testator, which, as being a tort, would at common law have died with the party guilty thereof.

In all cases of debt and contract the liability reaches to the executor who is answerable in his representative character. Whether the debt of the testator arose by record, specialty, or simple contract, it survives against his representative, who sustains the duties, as well as exercises the rights, of the deceased. It is said also that debt will lie against the executor of a sheriff for an escape<sup>m</sup>, though an action on the case for the same cause cannot be brought against the executor. Issues forfeited and fines imposed in inferior courts of record, as at quarter sessions, and by stewards in their leets, are said to be recoverable against the representative<sup>n</sup>. So also a relief, or fine due to the Lord of the manor from the testator<sup>o</sup>. Upon breaches of covenant by the testator, where the subject of the contract was valuable and beneficial, as to pay rent, or repair premises, the contract may be enforced against the executor. And whether a contract be under seal, or not, whether it be express or implied, it devolves upon the legal representative, who is equally answerable for a bill or note on which the deceased had incurred an express responsibility, and for such liabilities as arise by implication, and belong to the head of implied assumpsit. Remedies which are given for mere wrongs and grievances, and such as are denominated *torts*, or which imply force, and

<sup>m</sup> Dyer 322.

<sup>n</sup> Com. Dig. Admon. B. 14.

<sup>o</sup> Com. Dig. B. 14.

disturbance, such as battery, false imprisonment, trespass upon lands, slander, nuisance, and the like, are within the scope of the rule—*actio personalis moritur cum persona*.

Sometimes, indeed, by varying the denomination of the action, the difficulty interposed by the above rule may be got over. Thus, although the action of trover will not lie against the executor for a conversion by the testator, because the plea to that form of action is *not guilty*, and so the question is upon the *guilt* of the person deceased; yet if the property was sold by the testator, his executor may be sued in the form of *assumpsit*, on the liability of the testator for money had and received to the use of the plaintiff. And so in similar cases. The true grounds and criteria of these distinctions will be found in the case of *Hambly v. Trott*<sup>p</sup>.

Though the cause of action should not arise upon a contract of the testator, until after his decease, the executor is liable to the extent of the assets, as where money becomes due upon the testator's bond or note after his death<sup>q</sup>.

An executor by his misconduct may make himself personally responsible, and liable to answer a demand originating with his testator, out of his own property. Thus if he be guilty of wasting the effects of the testator, which in legal language is called a *devastavit*, the judgment in the action against him will be *de bonis propriis*<sup>r</sup>. A false defence, where the falsity must lie within his own knowledge, induces the same

*Of the consequences of wasting the testator's assets; or of making a false defence to an action.*

<sup>p</sup> Cowp. 375.

<sup>q</sup> Com. Dig. Pleading (2 D. 2.)

<sup>r</sup> 3 Bac. Abr. 77.



consequence to him; as if he pleads a *release* made to himself<sup>a</sup>; or that he never was an executor<sup>t</sup>. In such cases if the plea be found against him, the judgment will be in the alternative *de bonis testatoris et si non, de bonis propriis*.

Where an executor may be held to bail.

Though executors are not in general liable to be held to bail in their representative capacity<sup>z</sup>, yet as by wasting the property, they render themselves personally liable, such misconduct is followed also by a liability to be arrested and held to bail<sup>y</sup>. But the suggestion of such a *devastavit* will not create this liability without the oath of the plaintiff<sup>z</sup>. If the sheriff returns a *devastavit* to a writ of execution the executor may be held to bail in an action on the judgment<sup>a</sup>. And it seems that wherever an executor has by an actionable promise rendered himself liable in his own person to pay the debt of his testator, he may be compelled to find bail to the action<sup>b</sup>.

Of the pleading by executors, and of the judgment and execution against them.

An executor defendant is intitled to be paid costs if the judgment in the action is in his favour<sup>c</sup>. And if he plead a plea which is false, the judgment as to the costs will be *de bonis testatoris si, et si non, de bonis propriis*<sup>d</sup>. But if he plead that he has fully administered, or that he has administered all except, &c. and the plaintiff, admitting the truth of such plea, take judgment of the future assets in the one case, or of the assets admitted in part, and for the residue of assets in futuro, in the other, such defendant executor will not be liable to costs. Nor, as it seems, if he plead

<sup>a</sup> Cro. Jac. 671.

<sup>t</sup> 1 Roll. Abr. 930. 933.

<sup>z</sup> 3 Bac. Abr. 101.

<sup>y</sup> Ibid.

<sup>z</sup> Ibid.

<sup>a</sup> Ibid.

<sup>b</sup> 1 T. R. 716.

<sup>c</sup> 3 Bac. Abr. 100.

<sup>d</sup> Ibid.

several pleas, as non assumpsit, and plene administravit, and one of them be found for him; but if the plaintiff take judgment on the plea of plene administravit of the assets in futuro, and go to trial on the non assumpsit, and obtain a verdict, he will be entitled to costs<sup>a</sup>.

The judgment in common cases against an executor or administrator is for the debt, or damages, and costs to be levied of the goods and chattels of the testator, or intestate, in the hands of the defendant, if he have so much thereof in his hands to be administered; and if he have not, then the costs to be levied of his own proper goods<sup>f</sup>. If the sheriff return *nulla bona* generally, the proceeding may be by scire fieri, or by action of debt on the judgment suggesting a devastavit. On the latter, he may have execution immediately against the defendant in all its different forms of *capias ad satisfaciendum*, *fieri facias*, *de bonis propriis*, or writ of *elegit*<sup>g</sup>. The form and incidents of the judgment of assets *quando acciderint* may be accurately understood by consulting the authorities in the margin<sup>h</sup>.

Since the statute 38 Geo. 3. c. 87. an executor can neither sue or be sued till he arrives at the age of twenty-one; but where there are several executors, and some under age, the action must be against all such as are under age appearing by guardians. If there be more executors than one they must regularly

<sup>a</sup> Tidd. K. B. 896.

<sup>f</sup> Tidd. K. B. 941. 4 T. R. 648. 7 T. R. 359.

<sup>g</sup> Tidd. K. B. 942. 957.

<sup>h</sup> Tidd. Pract. K. B. 1038. et seq. 2 Saund. 226. 1 Vent. 94, 95. 7 T. R. 29.

be all sued together; that is, where they have all administered; but where any have not administered, such need not be joined<sup>1</sup>; the case of plaintiffs executors being in this respect different, for they *must* all join, though all may not have administered. Strangers have no means of knowing who are executors but by their visible acts.

Of the liabilities of husband and wife executrix, reciprocally, for waste done by the other.

The husband of an executrix must be joined in an action against her; but if such action be brought jointly against them, and, a judgment being obtained, the husband die leaving his wife surviving him, no action of debt on such judgment will lie against her suggesting a devastavit of the husband. Nevertheless, if an executrix marry, and the husband be guilty of wasting the goods, this will be also the devastavit of the wife, and both will be answerable<sup>2</sup>. So again, if an executrix commit a devastavit, and afterwards marry, the husband, together with his wife, is chargeable for it during the coverture<sup>1</sup>.

Of the consequences of the marriage of an executrix, where the testator is indebted to her; or where her husband is indebted to the testator.

If the testator, being indebted to a woman, make her his executrix, and she afterwards marry, or were married in his life-time, the husband may retain the debt out of the assets; and so if the husband were indebted to the testator, and his wife be made executrix, the debt is released in law, as much as if the wife herself had been the debtor; though if an executrix, after the death of the testator, marry the debtor of the testator, this will be in law a devastavit<sup>m</sup>. These doctrines are consequences of the principle, that, if a married woman be an executrix, or

<sup>1</sup> 1 Lev. 161.

<sup>2</sup> Ambl. 162.

<sup>1</sup> Cro. Car. 510.

<sup>m</sup> Ex. Off. 207.

administratrix, the husband has a joint interest with her in all the effects of the deceased; and is enabled by law to assume the whole administration, and to act in it to all purposes with, or without, the consent of the wife<sup>a</sup>. Nor can the wife do any valid act as such executrix or administratrix, without the husband's concurrence<sup>b</sup>. Nevertheless, if the husband die in her life-time, the right of administration survives to her; and on the other hand, nothing survives to the husband, in case of her death in his life-time; and it is said that, if she make a will, even without her husband's consent, though to all other purposes such will is inoperative, yet it may transmit the executorship in respect to the property so vested in her in *auter droit*<sup>c</sup>.

Although an executor is entitled as such to sue in a court of conscience, he is not liable to be sued there; such a court not being a proper tribunal to take account of assets<sup>d</sup>.

An executor may sue, but not be sued, in a court of conscience:

Persons entitled to legacies under a will, or to distributive shares of an intestate's effects, may assert their claims in courts of equity, which can not only give effectual relief, but stipulate terms conducive to general justice, and the conscientious claims of all parties. Equity, as we have seen, not only considers an executor as a trustee, and therefore liable to account upon oath,<sup>(3)</sup> but in certain cases as trustee for the

Of the superior relief in equity against executors.

<sup>a</sup> Com. Dig. D. 4 T. R. 617.

<sup>b</sup> Off. Ex. 207. Com. Dig. D.

<sup>c</sup> 2 Bl. Com. 408.

<sup>d</sup> Dougl. 263.

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(3) Guardians and receivers, being bound by recognizance to account regularly, may be obliged so to do on application by pe-

nearest of kin of the undisposed surplus. A bill, therefore, in equity, is the mode of compelling a discovery of assets, as well as an account; and also of calling for a distribution, under the statute, of an intestate's personal estate<sup>r</sup>. And if, without a reasonable cause assigned, an executor detain the effects in his hands for a length of time, or use them in trade, or even keep them idle and unproductive in his hands, he will be called upon for interest in a court of equity<sup>s</sup>. In every case where an executor is made to pay interest for a breach of trust, he is liable; as of course, to costs<sup>t</sup>; à fortiori, where he is convicted of conduct directly and palpably fraudulent; even though the will may have directed his expenses to be paid out of the estate<sup>u</sup>. But where an executor fails in a suit, instituted merely for obtaining the opinion and directions of the court, he will not be subjected to costs<sup>v</sup>.

Of the  
necessary  
parties to  
suits.

It is a general rule in courts of equity, that all persons are to be made parties, who are either legally or beneficially interested in the subject matter, and result of the suit. All trustees, therefore, and all executors and administrators, who are considered as trustees in courts of equity, must be made parties to every suit that concerns the subject matter of their trust; as where the suit regards the payment of a legacy, or an annuity, marshalling assets, the payment of debts, or

<sup>r</sup> Com. Dig. Chancery, (3 D. 1)

<sup>s</sup> 1 Vez. Jun. 704.

<sup>t</sup> Ibid.

<sup>u</sup> 2 Atk. 126.

<sup>v</sup> 1 Vez. Jun. 205.

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tition; but there is no regular way of calling an executor to account, but by filing a bill.

distributive shares". So an executor appointed only *durante minore ætate*, if he have possessed himself of any part of the assets, must be a party to any suit instituted respecting them.

Though an executor before probate, may file his bill, and it is sufficient, if he afterwards takes out probate at any time before the hearing<sup>a</sup>, yet in a bill for an account of the personal estate of the deceased, though the person who has a right to administer is made a party, this is not sufficient without an actual administration taken out<sup>c</sup>. But if a sufficient reason be stated in the bill for not bringing an executor into court, as, if he be resident out of the jurisdiction of the court<sup>d</sup>, or if the representation be charged to be in litigation in the ecclesiastical court, or the plaintiff do not know who he is<sup>e</sup>, it is not an objection that the executor is not a party. Again, in the case of a mortgage in fee, a bill to redeem must make the executor of the mortgagee a party to the suit, as well as the heir at law, because the money is to return to the same fund out of which it came: but in a bill to foreclose the heir of the mortgagor, it is not necessary to make the personal representative a party to the suit<sup>b</sup>; and if a tenant in fee mortgage, by creating a term, the personal representative ought not to be a party to a bill of foreclosure<sup>f</sup>: for though the heir is entitled to have the personal estate applied in exoneration of the real, yet he must enforce that right by filing his bill; and so if the heir pays out of the assets descended the specialty debt of the ances-

<sup>a</sup> Rep. Temp. Finch. 82.

<sup>c</sup> 3 P. Wms. 352.

<sup>b</sup> 3 P. Wms. 349. but see Prec. in Ch. 63. 4.

<sup>d</sup> Prec. in Ch. 83.

<sup>e</sup> 2 Atk. 51. 1 Vern. 95.

<sup>f</sup> 3 P. Wms. 334. note A.

<sup>g</sup> 13 Vez. Junr. 234.

tor, it belongs to him to exhibit his bill against the personal representative, to compel the application of the personal estate, in exoneration of the real, but this is not the concern of the creditor.

The above-mentioned rule, however, is not without some exceptions; as where creditors are seeking an account of the estate of their deceased debtor, for the payment of their demands, a few of the whole number are permitted to maintain the suit, in behalf of the rest, who are allowed to come in under the decree<sup>d</sup>. So also, one legatee may sue without the others, who may come in under the decree<sup>e</sup>; yet where the residue of the personal estate was devised to three, it has been held that one could not sue for his part, without joining the others<sup>f</sup>. And so where the residue was limited to one for life, and upon his decease to other persons, remainders over, it was held that all persons interested under the limitations, must be parties to a bill for the payment<sup>g</sup>. But one of the next of kin of an intestate may sue for his distributive share, and the master will be directed to enquire, and state to the court, who are the next of kin of the intestate, and they may come in under the decree; though if it appears by the bill, that the plaintiff knows who are the other next of kin, it seems he must make them parties to the suit.

<sup>d</sup> 2 Vez. 312.

<sup>e</sup> 3 Bro. C. C. 365.

<sup>f</sup> 2 Ch. Ca. 124.

<sup>g</sup> 3 Bro. C. C. 229.

## SECTION XIII.

*Of the effect of Promises by Executors and Administrators, to satisfy Claims upon the Estate of the Testator or Intestate.*

THE first branch of the 4th section of the statute of frauds 29 Car. 2. c. 3. enacts that no action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

It seems proper to premise, that to bring the party within the protection of this provision of the statute, he must be actually invested with the office, at the time of making the promise: he can receive no benefit from it, by acquiring the office after the promise has been made by him; for which, if it were not clear enough upon the words of the statute, the case of *Tomlinson v. Gill*<sup>a</sup> is an authority. As an immediate executor derives all his title from the will of the person he represents, and the interest and of-

That to bring the party within the protection of this provision of the statute, he must have been actual executor or administrator, when he made the promise.

<sup>a</sup> Ambl. 330.



fice are completely vested in him, at the instant of the testator's death, his promise is prevented by this statute from binding him personally, though he makes it before probate, which is not the origin but the authentication of his title. But an administrator derives his office and interest from the ordinary, and therefore, a verbal promise by a person, in virtue of his expectation of representing an intestate, is not invalidated by this clause of the 4th section ; and though the grant of administration has relation to the time of the intestate's death<sup>b</sup>, such relation cannot, it is presumed, affect the application of the statute.

The statute of frauds and perjuries, in superadding the necessity of writing, to give an actionable effect to the promises therein specified, has given no positive virtue to the writing itself, so as to make it a substitute for the consideration necessary to support the promise according to the ancient maxims of our municipal law. The judgment of C. B. Skinner in the House of Lords, in the case of *Rann v. Hughes*<sup>c</sup>, is clear upon this point, which arose upon a promise in writing, made by executors, and wherein the Chief Baron, in very clear terms, made it appear, that this branch of the statute, being made for the relief of personal representatives, did certainly not intend to charge them further than by common law they were chargeable. To that judgment, therefore, the reader is referred as a satisfactory argument for this construction of the statute.

The statute  
has made

To the comments of the Chief Baron it may be added, that there not only exists as much necessity since,

<sup>b</sup> 2 Roll. Abr. 554.

<sup>c</sup> 7 T. R. 350. N. (a.) 7 Bro. P. C. 556. S. C.

as before, the statute for a consideration to support a promise, though made in writing, but the consideration also continues to be an essential part of the allegations in the declaration in an action upon such promise. For the statute has made no alteration in the method of pleading, either by addition or defalcation, so that, as on the one hand the consideration continues necessary to be stated, agreeably to the rule at the common law; so on the other, it is not held to be necessary on account of the statute, to shew by the declaration that the promise was in writing; but it is left to evidence; which last-mentioned point rests upon the general rule, distinguishing between the cases wherein a matter has its *origin* in an act of parliament, and is thereby required to be in writing, and where an act of parliament makes writing necessary to a matter existing at common law; in the latter of which cases the thing need not be shewn in pleading to be in writing, but in the former, it must be pleaded with all the circumstances required by the act<sup>d</sup>. Thus, a will must be pleaded to be in writing, upon the statute of Henry 8. for by that statute the power of devising is, in certain cases, *first* given; and it is by virtue of that act, consequentially enlarged by the statute of 12 Car. 2. that we now exercise the testamentary power over real estate (1). The

no alteration in the mode of pleading, therefore, though the promise is in writing, the declaration must still set forth the consideration; though it is not necessary to shew that the promise was in writing.

<sup>d</sup> 2 Salk. 519. and see 3 Burr. 1890, per Yates Justice.

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(1) It has generally been holden, however, upon the several branches of the 4th section of the statute, that though a plaintiff need not in his declaration shew any note in writing, but that it will be sufficient for him to produce it on the trial; yet that if such promise be pleaded in bar of another action, it must be alleged to

But though the declaration need not state the promise to have been in writing, if

result is, that a promise, to charge an executor personally, and in his own right, so as to make him liable to pay out of his own property, must not only be in writing, but founded upon a sufficient consideration in law; which *authentication by writing* must be proved by the production of the writing itself, and which *consideration* must be both proved and stated.

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such promise is pleaded by the defendant, the plea should shew it to have been in writing.

be in writing, so as that it may appear to be a contract on which an action will lie. Thus in a case which took place a very few years after the statute was passed, *Elizabeth Case v. James Barber*, Sir Thom. Raym. 450. the plaintiff declared in *indebitatus assumpsit* for 20*l.* for meat, drink, washing and lodging, for the defendant's wife, provided for her at the request of the defendant; the defendant pleaded, that after the making of the promise, &c. and before the exhibiting of the plaintiff's bill, it was agreed between the plaintiff and defendant and one J. B. his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife's, then in the plaintiff's custody, and that the plaintiff should accept the said J. B. the son for her debtor for 9*l.* to be paid as soon as the said J. B. should receive his pay due from His Majesty to him as lieutenant of the ship, called, &c. in full satisfaction and discharge of the premisses in the declaration mentioned, and averred, that the plaintiff at the same time did deliver to the defendant the said clothes, and that she accepted the said J. B. the son for her debtor for the said 9*l.* and that the said son agreed to pay the same accordingly; and that the said J. B. afterwards, and as soon as he received his pay as aforesaid, viz. on such a day, was ready, and offered to pay the 9*l.* and the plaintiff refused to receive it, *et hoc paratus*, &c. to which plea the plaintiff demurred, and judgment was given for the plaintiff for two reasons: 1. because it did not appear that there was any consideration for the promise on the son's part: 2. admitting that there *was* a consideration, yet, that by the statute of frauds and perjuries, the agreement ought to be in writing, or the plaintiff could have no remedy thereon; and though upon such an agreement the *plaintiff* need not set forth the agreement to be in writing, yet when the *defendant* pleads such an agreement in bar, he must plead it so that it may appear to the court, that an action will lie upon it, for he shall not take away

But in order to charge the executor or administrator *de bonis propriis*, it is not necessary to aver in the declaration that the defendant has assets, for if the promise be in writing, and supported by a consideration, as forbearance to prosecute, at the request of the defendant (2), the plaintiff, by acquiescing in a

the plaintiff's present action, and not give him another upon the agreement pleaded.

The case of *Villers v. Handley*, in the Common Pleas, 2 Wils. 49. proceeded upon the same doctrine upon the 3d section of the statute, which enacts, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note, in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act or operation of law. The action was debt upon a bond for 52*l.* 16*s.* against the heir of the obligor; the defendant confessed the bond and debt, but pleaded that he had nothing by descent, but a small cottage in T. except a reversion after a term of 500 years, commencing the 16th of October 1746, then to come and unexpired, and *hoc paratus*, &c. to which plea there was a general demurrer; and for the plaintiff it was objected that the plea was ill in substance, because it was not alleged therein, that the lease for 500 years was *in writing* (according to the book, because it was not by *deed*, which seems to have proceeded upon a mistake of the law; and see the same book, page 26, Farmer on dem. *Earl v. Rogers*) and because if the lease was not in writing, it was void by the statute of frauds and perjuries, and of this opinion was the court, (Clive and Bathurst Justices, being present) and upon this point they gave judgment for the plaintiff.

(2) In *William Banes's* case, 9 Rep. 93 b. it was clearly held, that the declaration was good enough, without saying that defendant had assets, for it shall be intended *prima facie*, that she had assets. But Coke said, that he conceived the truth to be, that if

What allegations are necessary, to be made in the pleadings

possible detriment to himself, by his relinquishment of legal proceedings (for he might at least have obtained a judgment of *assets quando acciderint*) has purchased a title of action upon the undertaking of the defendant. But without such special agreement, in which the executor steps out of his representative character, an action cannot be sustained against an

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in actions  
on the spe-  
cial pro-  
mise of  
executors  
and admi-  
nistrators.

there had not been any debt, or if there had been a debt, and the executrix had nothing in her hands at the time, she might have given it in evidence. But this last position seems not to be law, according to the cases, see 1 Roll Abr. 24. pl. 33. 2 Lev. 3. Davis v. Reynor, Yelv. 11. Goreing v. Goreing, 1 Vent. 120. Davis v. Wright, Cro. El. 91. Trewinian v. Howell, 1 Vez. 126. Recch v. Kennegae. But it seems clear enough that the executor must be liable, and that there must be an existing debt, otherwise there will be no consideration. An executor so closely represents the person of the testator, that if a man executes a bond, his executors are bound, though they are not named; therefore, in a declaration against the executor upon the bond of the testator, it is not necessary to say that the obligor bound himself and his executors; but if the suit be against the heir, it is a material allegation to say, that the ancestor bound himself and his heirs, and to prove that he did so in fact; for the heir is not bound by his ancestor's bond, unless he be expressly named. If, therefore, the declaration omits to state that the heir was bound, it is substantially defective: and by the case of Barber v. Fox, 2 Saund. 136. it appears that this is such a defect as a verdict cannot cure; for unless it be shewn upon the pleadings that the heir was bound, there will appear to have been no consideration for his promise, and so no sufficient cause of action. Thus also, if the heir promise to pay a simple contract debt of the ancestor, no action will lie upon this promise, in as much as it is without consideration, for the heir is not chargeable upon such debts of his ancestor. Cro. James, 47. Fish v. Richardson. But if an executor promise to pay, in consideration of a consent only by an assignee of a debt not to sue, the promise stands upon a sufficient consideration, 1 Roll. Abr. 20, pl. 11. And so doubtless I conceive the heir,

executor, otherwise than as an executor; and if the action is brought against him in the character of executor, to recover a demand out of the testator's estate, any special promise to pay the testator's debt is a mere *nudum pactum*, if there be no assets, and if there be any, the extent of the promise is measured by the extent of the assets; or, in other words, the promise superinduces no obligation upon the ori-

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under the same circumstances, will be liable, if the debt be founded upon a specialty.

In *Forth v. Stanton*, 1 Saund. 210. there was no allegation of any undertaking to forbear on the part of the assignees; which case was thus—Plaintiff declared that the defendant's testator was indebted to A. who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use; and that the defendant, in consideration that the plaintiff would accept the defendant for his debtor, promised to pay the debt to the plaintiff. And for want of alleging a sufficient consideration for the promise, the declaration was judged insufficient. Upon the principle of the determination in *Barber v. Fox*, cited above in this note, it seems that a verdict for the plaintiff could not have cured this radical defect: but in the case of *Roe v. Haugh*, 1 Salk. 29. which was the converse of the last-mentioned case in its circumstances, and the relative situation of the parties, the verdict was held by four judges against three to have cured the omission to allege a sufficient consideration in the declaration. There, in consideration that the plaintiff would accept C. to be his debtor for 20*l.* due to him from A., in the place of A., C. promised and undertook to B. to pay to him the 20*l.*; and this was adjudged good, after a verdict, without express averment that A. was discharged; for the majority of the judges in the Exchequer Chamber held that being after verdict, they ought to do what they could to help it, and that, therefore, they would not take it as a promise only on the part of C. because as such it could not bind, unless A. was discharged; but they construed it as a mutual promise, viz. that C. promised B. to pay the debt, and B. promised *consideratione inde* to discharge A.

ginal representative liability. Since the case, however, of *Wain v. Warlters*<sup>\*</sup>, and more particularly *Egerton v. Matthews*<sup>†</sup>, it seems that the writing, to be valid, within the fourth section of the statute, should, in the case of such promise made by an executor, not only state the consideration whether it be forbearance of suit, or whatever else, in terms, but that the undertaking on both sides should be comprised in the agreement, so as to make it a subject of action to either party; for it was intimated by the Chief Justice, in the first-mentioned case, that 'the obligatory part of the transaction was indeed the promise, which will account for the word promise being used in the first part of the clause, but still in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing.'

<sup>\*</sup> 5 East. 10.

<sup>†</sup> 6 East. 307.

# APPENDIX.

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## I.—THE STATUTES.

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29 Car. 2. c. 3.

*An Act for the Prevention of Frauds and Perjuries.*

**F**OR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That, from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.

Parol leases and interests of freehold shall have the force of estates at will only.



Except  
leases not  
exceeding  
three  
years, &c.

II. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

No leases  
or estates  
of freehold  
or copy-  
hold shall  
be granted  
or surren-  
dered by  
word.

III. And moreover, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold, or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time after the said four and twentieth day of June, be assigned, granted, or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.

Promises  
and agree-  
ments by  
parol.

IV. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Devises of  
lands shall  
be in writ-  
ting, and  
attested by  
three or  
four wit-  
nesses.

V. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person, in his presence, and by his express directions, and shall be attested and subscribed in the presence of the

said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect.

VI. And moreover, no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall at any time after the said four and twentieth day of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

How the same shall be revocable.

VII. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

All declarations or creations of trusts shall be in writing.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been, if this statute had not been made; any thing herein-before contained to the contrary notwithstanding.

Trusts arising, transferred or extinguished by implication of law, are excepted.

IX. And be it further enacted, That all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise, or else shall likewise be utterly void, and of none effect.

Assignments of trust shall be in writing.

X. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June,

Lands, &c. shall be liable to

the judgments, &c. of cestuy que trust:

it shall and may be lawful for every sheriff, or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance, hereafter to be made, or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seized or possessed, or hereafter shall be seized or possessed in trust for him against whom execution is so sued, like as the sheriff or other officer might, or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments, of such estate as they be seised of in trust for him at the time of the said execution sued, (2) which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons, as shall be so seised or possessed in trust for the person against whom such execution shall be sued; (3) and if any *cestuy que* trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, there, and in every such case, such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom, or usage, to the contrary in any wise notwithstanding.

And held free from the incumbrances of the persons seised in trust.

Trusts shall be assets in the hands of heirs.

No heir shall by reason thereof become chargeable of his own estate.

XI. Provided always, that no heir shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea, or confession of the action, or suffering judgment by *nient dedire*, or any other matter be chargeable, to pay the condemnation out of his own estate; (2) but execution shall be sued of the whole estate, so made assets in his hands by descent, in whose hands soever it shall come, after the writ purchased, in the same manner as it is to be at and by the common law,

where the heir at law pleading a true plea, judgment is prayed against him thereupon ; any thing in this present act contained to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following, (2) be it further enacted by the authority aforesaid, That from henceforth any estate, *pur auter vie*, shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor, by three or more witnesses ; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple, (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands.

*Estates pur auter vie, shall be devisable.*

*And shall be assets in the heir's hand.*

*And where there is no special occupant, shall go to the executors.*

XIII. And whereas it hath been found mischievous, that judgments in the King's Courts, at Westminster, do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged, or suffered and signed in the vacation time, after the said term, whereby many times purchasers find themselves aggrieved.

XIV. Be it enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, any judge or officer of any of his Majesty's Courts of Westminster, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper, book, docket, or record, which he shall sign ; which day of the month and year shall be also entered upon the margin of the roll of the record, where the said judgment shall be entered.

*The day of signing any judgment shall be entered on the margin of the roll. This clause extends to counties palatine, by 8 Geo. I. c. 25. s. 6.*

XV. And be it enacted, That such judgments as against purchasers *bona fide*, for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day

*And such judgments as against purchasers shall relate to such time only.*

of the term whereof they are entered, or the day of the return of the original, or filing the bail; any law, usage, or course of any court to the contrary notwithstanding.

Writs of execution shall bind the property of goods but from the time of their delivery to the officer.

XVI. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, no writ of *fiery factas*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed: and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same,) endorse upon the back thereof, the day of the month or year, whereon he or they received the same.

Contracts for sales of goods for ten pounds or more.

XVII. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto lawfully authorised.

The day of the enrolment of recognizances shall be set down; and lands in the hands of purchasers, bound from that time only.

XVIII. And be it further enacted, by the authority aforesaid, That the day of the month, and year of the enrolment of the recognizances, shall be set down in the margin of the roll where the said recognizances are enrolled; (2) and that from and after the said four and twentieth day of June, no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser, *bona fide*, and for valuable consideration, but from the time of such enrolment; any law, usage, or course of any court to the contrary in any wise, notwithstanding.

Nuncupative wills.

XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury, (2) be it enacted by the authority aforesaid, That, from and after the aforesaid four and twentieth day of

June, no nuncupative will shall be good, where the estate thereby bequeathed, shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses, (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

Explained  
by 4 Ann.  
c. 16. s. 14.

XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

Probates of  
nuncupative wills.

XXII. And be it further enacted, That no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest, therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

Wills of  
personal  
estate not  
to be re-  
voked by  
word of  
mouth  
only.

XXIII. Provided always, That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages,

Soldiers'  
and mari-  
ners' wills  
excepted.

and personal estate, as he or they might have done before the making of this act.

The jurisdiction of courts saved.

XXIV. And it is hereby declared, That nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the Prerogative Court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this act.

22 and 23 C. 2. c. 10. husbands not compellable to make distribution of the personal estates of their wives.

XXV. And for the explaining one act of this present Parliament, intituled, "An Act for the better settling of intestates' estates," (2) be it declared by the authority aforesaid, That neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. Made perpetual by 1 Jac. 2. c. 17. s. 5.

### 9 Geo. 2. c. 36.

*An act to restrain the disposition of lands, whereby the same become unalienable.*

Preamble.

WHEREAS gifts or alienation of lands, tenements or hereditaments, in Mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called Charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof be it enacted by the King's

most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-six, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) and be enrolled in his Majesty's high court of *Chancery*, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks six calendar months at least before the death of such donor or grantor, (including the days of the transfer and death) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

After 24 June, 1736, no manors, lands, &c. nor money to be laid out in lands, to be given for charitable uses,

unless by deed indented, and executed before 2 witnesses 12 months before the death of the donor, and enrolled, &c.

II. Provided always, That nothing herein before mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the

The said limitations not to extend to purchase



or transfers made for valuable considerations.

grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and *bona fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer without fraud or collusion.

Gifts, &c. made after 24 June, 1736, otherwise than directed by this act, to be absolutely void. *Sir William Ashburnham et al. v. Bradshaw et al.* 4 Dec. 1739. by the judges at *Serjeant's Inn*. *Soresbery, v. Hollings*, 6 Aug. 1740. in *Chan.* The attorney general, *v. Greaves*, 21 Nov. 1752.

III. And be it further enacted by the authority aforesaid, That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-six, be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.

IV. Provided always, That this act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster.

No college to hold more ad-

V. Provided nevertheless, and be it enacted by the authority aforesaid, That no such college or house of learning,

But not to prejudice the 2 universities, or the colleges of Eton, Winchester, or Westminster.

which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices as are or shall be equal in number to one moiety of the fellows or persons usually stiled or reputed as fellows, or, where there are or shall be no fellows or persons usually stiled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may by the present constitution of such college or house of learning consist, shall from and after the twenty-fourth day of June, one thousand seven hundred and thirty-six, be capable of purchasing, acquiring, receiving, taking, holding or enjoying any other advowsons of ecclesiastical benefices by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of, the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited.

advowsons than shall be equal to 1 moiety of their fellows, &c.

VI. Provided always, That nothing in this act contained shall extend or be construed to extend to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland.

This act not to extend to estates in Scotland.

### 14 Geo. 2. c. 20.

*IX. And whereas, by an act made in the twenty-ninth year of the reign of king Charles the second, intituled, An act for prevention of frauds and perjuries, amongst other things, it is enacted, That estates pur auter vie, whereof no devise should be made, should, in case there should be no special occupant thereof, go to the exccutors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands: and whereas doubts have arisen, where no devise has been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong; be it enacted by the authority aforesaid, That such estates pur auter vie, in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have*

29 Car. II. c. 3.

Surplus of estates pur auter vie, how to pass, if not devised.

been so devised, shall go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate.

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23 Geo. 2. c. 6.

*An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils, concerning Real Estates in that Part of Great Britain called England, and in his Majesty's Colonies and Plantations in America.*

WHEREAS by an act made in the twenty-ninth year of the reign of his late Majesty King Charles the Second, intituled, "An act for prevention of frauds and perjuries," it is amongst other things enacted, that, from and after the twenty-fourth day of June, in the year of our Lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements devisable, either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction ; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision : but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said act ; therefore, for avoiding the same, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the

same, That if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act; notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will or codicil.

If a devise or legatee under the will attests a will, the devise or legacy shall be void, and the attestation effectual.

II. And be it further enacted by the authority aforesaid, That in case, by any will or codicil already made, or hereafter to be made, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged, hath attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act.

If lands are charged with the payment of debts, the attestation of a creditor is good, and he is a good witness to prove the execution.

III. And be it further enacted by the authority aforesaid, That if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness to the execution of such will or codicil,

within the intent of the said act, notwithstanding such legacy or bequest.

IV. Provided always, and be it further enacted, That in case of such tender and refusal as aforesaid, such person shall in no wise be intituled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid, satisfied or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever.

V. And be it further enacted, That in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, shall have died in the life-time of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest, on tender made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

The credit of every witness, so attesting, is to be subject to the determination of the court and jury.

VI. Provided always, That the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before-mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court, and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the Court of Equity, in which the testimony or attestation of any such witness shall be made use of; in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined.

VII. And be it further enacted by the authority aforesaid, That no person to whom any beneficial estate, interest, gift or appointment, shall be given or made, which is hereby

enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him, in or by any such will or codicil; or demand, receive, or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever.

VIII. Provided always, and be it enacted by the authority aforesaid, That this act, or any thing herein contained, shall not extend, or be construed to extend, to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceeding the sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, as to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid; and also that this act, or any thing herein contained, shall not extend or be construed to extend, to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity, commenced by the heir of such devisor, or the devisee in any such prior will or codicil, for recovering the lands, tenements, or hereditaments, mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the said sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, and which has been already determined in favour of such heir at law, or devisee, in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same man-

ner, to all intents and purposes, as if this act had never been made; any thing herein-before contained to the contrary thereof in any wise notwithstanding.

IX. Provided always nevertheless, and it is hereby declared, That no possession of any heir at law, or devisee, in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil, attested according to the true intent and meaning of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil attested according to this act, should or might take effect shall be deemed to be a possession within the intent and meaning of the clause herein last before contained.

X. And whereas in some of the British colonies or plantations in America, the said act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or acts of assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements, and hereditaments, have been required: therefore, to prevent and avoid doubts which may arise in the said colonies, or plantations, in relation to the attestation of such devises of lands, tenements, and hereditaments, be it enacted by the authority aforesaid, That this act, and every clause, matter, and thing therein contained, shall extend to such of the said colonies and plantations, where the said act of the twenty-ninth year of the reign of King Charles the Second, is by act of assembly made, or by usage received as law, or where, by act of assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements, or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said act of the twenty-ninth year of the reign of King Charles the Second in England.

XI. Provided always, That as to cases arising in any of

the said colonies or plantations in America, no such devise, legacy, or bequest as aforesaid, shall be made null and void, by virtue of this act, unless the will or codicil, whereby such devise, legacy, or bequest shall be given, shall be made after the first day of March, which shall be in the year of our Lord one thousand seven hundred and fifty-three.

26 Geo. 3. c. 63.

*An Act for the further preventing Frauds and Abuses attending the payment of Wages, Prize Money, and other allowances, due for the service of Petty Officers and Seamen on board any of his Majesty's ships.*

**WHEREAS** *great frauds and abuses are daily practised in the receiving of seamen's wages, notwithstanding former acts of parliament made for preventing the same : for remedy whereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That, from and after the first day of August, one thousand seven hundred and eighty-six, no letter of attorney, made by any petty officer, or seaman in the service of his Majesty, his heirs or successors, or letter of attorney, made by the executors or administrators of any such officer or seaman, in order to empower or entitle any person or persons to receive any wages, pay, or allowances of money of any kind, due, or to grow due for such service, shall be good and valid, or sufficient for that purpose, unless such letter of attorney shall be made and declared to be revocable by the express words thereof; and that no letter of attorney, or will, made by any petty officer or seaman in the service of his Majesty, his heirs or succes-*

Preamble.

From Aug. 1, 1786, no letter of attorney, of a petty officer, &c. to be valid, unless made revocable.

Letters of attorney, &c. to be



attested by  
the captain  
of the ship,  
&c.

sors, whereby any wages, pay, prize money, or allowance of money of any kind, due, or to grow due for such service, is authorised to be received or bequeathed, shall be good and valid, and sufficient for the purpose, unless such letter of attorney, or will, if made by any such officer or seaman, then in the service of his Majesty, his heirs and successors, shall be signed before, and attested by, the captain, or by the officer then commanding, and one or other of the signing officers of the ship to which such petty officer or seaman shall belong, and shall specify in the body thereof, the name of the ship, and also the number at which the maker of such will, or letter of attorney, stands upon the ship's book; or by the agent of any of his Majesty's hospitals, or quarters appointed to receive sick and wounded seamen, commonly called *sick quarters*, in which such petty officer or seaman may be for the time; and unless such letter of attorney, or will, if made by any such officer or seaman who shall have been discharged from the service of his Majesty, his heirs or successors, or if such letter of attorney is made by the executors or administrators of any such officer or seaman, and made within the bills of mortality of the cities of London and Westminster, is attested by an officer to be appointed by the treasurer of his Majesty's navy, for the purpose of inspecting the wills, and letters of attorney, of such officers and seamen, or, if made at any of the ports where seamen's wages are paid, is attested by the treasurer of the navy's chief or second clerk there, or if made at any other place, is attested by the minister and churchwardens of any parish in England or Ireland, or in that part of Great Britain, called Scotland, by the minister and two elders of the parish, where such petty officer or seaman, executors or administrators, shall respectively reside.

if made  
within the  
bills of  
mortality,  
to be at-  
tested by  
an officer  
appointed  
for that  
purpose; if  
in any out-  
port, by  
the treas-  
urer of the  
navy's  
clerk; and  
in any other  
place by  
the minis-  
ter, &c.

Particu-  
lars to be  
specified in  
letters of  
attorney  
and will.

II. And be it enacted, by the authority aforesaid, That every such letter of attorney, and will, shall contain the name of the ship to which the person granting the same last belonged, and also the full description of the residence, profession, or business, of the person to whom, or in whose favour, the said letter of attorney, or will, is made, and also the day of the month, and place, where the said letter of attorney, or will, was executed.

III. And be it enacted, by the authority aforesaid, That after such letter of attorney, or will, shall be executed under the hand and seal of the party, and attested in manner above-mentioned, the same shall not be delivered to such party himself, or to any person or persons for his behalf, but the same, if executed abroad, shall be, with all convenient speed, sent by the commander of any of his Majesty's ships, or agent of his Majesty's hospitals or sick quarters, at the times when they transmit their respective returns to the navy, and sick and hurt boards; or, if executed in Great Britain or Ireland, shall be sent by the commander of any of his Majesty's ships, agents of his Majesty's hospitals, or sick quarters, treasurer of the navy's clerks, minister of the parish, or whoever of them shall attest such letter of attorney, or will, by the general post, addressed to the treasurer or paymaster of the navy, at the navy pay office, London.

Letters of attorney, &c. to be transmitted to the navy, or sick and hurt boards, &c.

IV. And be it enacted, by the authority aforesaid, That the said treasurer, or paymaster of the navy, shall immediately deliver over the same to the officer before-mentioned, appointed for inspecting the wills, and letters of attorney, of seamen; which inspector shall, immediately on receipt of such letter of attorney, or will, duly register the same, in a numerical and alphabetical manner, in a separate book or books, to be kept by him for the purpose of registering such letters of attorney, and wills, specifying the date of such letter of attorney, or will, and the place where executed, the name and addition of the person in whose favour such letter of attorney is granted, and the name and addition of the executor or executors named in such wills, and the names and qualities of the witnesses, attesting the same; and the said inspector is directed, and hereby required, if the same shall appear to be witnessed by the commander of any ship, or agent of his Majesty's hospital, or sick quarters, or treasurer of the navy's clerks, to examine and compare his signature to the attestation of such letter of attorney, or will, with that set and subjoined to the pay or muster-books of such ship, or with the returns made by the agent of such hospital, or sick quarters, or any public accounts signed by such clerk of the treasurer of the navy, to all which documents it is hereby directed he shall have free access at all times, or with

Letters of attorney, &c. to be delivered to the officers appointed to inspect them, who to register; them.

and to examine the signatures of the witnesses;

and where they appear not to be genuine, to stop them and acquaint the parties thereof.

If genuine, approbation to be stamped thereon, and kept as vouchers of the navy accounts.

Notice to be sent to the attorneys when powers are approved, and also checks, to authorise them to receive the money.

Notice of approbation of wills likewise to be sent, which will

any other instruments which he may have in his possession or power ; and in case it shall appear to him that such letter of attorney, or will, is not genuine and authentic, he shall not pass the same, but shall give notice by letter, to be sent by the general post, to the person in whose favour such letter of attorney is granted, or person or persons named executor or executors in such will, informing him or them that the said letter of attorney, or will, is stopt, and the reason thereof ; but if, upon such examination and enquiry, it shall appear to the said inspector, that the said letter of attorney, or will, is genuine and authentic, he, or a person authorised to officiate for him, shall sign his name to such letter of attorney, or will, and also put a stamp thereon, to be made and kept for the purpose, in token of his approbation thereof ; and every such letter of attorney shall be kept as one of the vouchers of the treasurer of the navy's accounts : and the said inspector shall, immediately after such enquiry and approbation, give notice by letter, to be sent by the general post, to the person in whose favour such letter of attorney is granted, that he has received and approved of the same, and he shall at the same time send to such attorney a check, specifying the number of such letter of attorney, the name and addition of the person granting the same, the name and addition of the person in whose favour the same is granted, the date and place when and where executed, and the names of the witnesses attesting the same, which said check shall be signed and stamped by the said inspector, or person authorised to officiate for him, and shall, to such attorney, stand in the place of his original letter of attorney, and shall be to him a sufficient authority to demand payment of and discharge all such wages, pay, prize money, or allowance of money, to which the person granting the same was entitled, for his service on board any of his Majesty's ships ; and the said inspector shall in like manner give notice, to be sent by the general post, to the person or persons named and appointed executor or executors in such will, that such will is received and approved of ; and the said inspector shall number and register the said will so signed and stamped by him as aforesaid, and shall make out a check, in the manner as above directed, with respect to letters of attorney, which

check he shall forward in like manner to the said executor or executors, and which shall be a sufficient authority for them, or for their attornies, to apply, upon the testator's death, to the said inspector, requesting that the will may be directed and sent by him to a proctor in Doctors Commons, where they may, on application, obtain probate thereof; which probate, when obtained, shall be lodged with the said inspector of seamen's wills, who, or the person authorised to officiate for him, is hereby directed to certify, upon the check formerly delivered, that a probate has been granted, and the check shall then, to such executor or executors, stand in the place of such probate, and shall be to him sufficient authority to demand payment of and discharge all sums that shall be due to him as executor to the party who made the said will.

authorise the executor to obtain probates.

Probates to be lodged with the inspector, and the same certified upon the check.

V. And be it enacted, by the authority aforesaid, That the above-mentioned inspector shall, in return to all letters of attorney, and wills, received by him from ministers of parishes, give notice as aforesaid, to the said minister, who transmitted the same, and not to the grantor thereof, of his having passed and approved of such letter of attorney, or will, and send the check by the general post, made out in the manner above-mentioned, to the said minister; and which notice from the said inspector shall be addressed to the minister of the parish, (naming the same,) without inserting the name of such minister, to be delivered to him at his manse or dwelling-house; and every such minister of a parish shall deliver the said check to the party who executed such letter of attorney, or will: and all letters and packets addressed to, or sent by, the said treasurer or paymaster of the navy, or inspector to be appointed as aforesaid, shall, from and after the passing of this act, be sent and received free from the duty of postage, in the same manner, and under the same restrictions, as the clerk assistant, and chief clerk without doors, of the house of Commons of Great Britain, now send and receive the same.

Inspector to send checks to the minister who transmits powers of attorney, &c. to be delivered to the grantors.

Letters touching the premises to pass free of postage.

VI. And be it enacted, by the authority aforesaid, That all captains and commanders of ships, shall, upon their monthly muster books, or returns, specify which of the men, mentioned in the said returns, have granted any letter of at-

Grants of letters of attorney to be inserted in the monthly returns.

torney during that month, or space of time, from the preceding returns, by inserting the date thereof opposite to the party's name.

The steps  
to be taken  
to recover  
wages, &c.  
due to men  
dying in-  
testate.

VII. And be it enacted, by the authority aforesaid, That when any petty officer or seaman belonging, or who shall have belonged, to any of his Majesty's ships, shall die intestate, leaving any wages, pay, prize-money, or allowance of money of any kind, due to them in respect of such service, the same shall not be paid unto any representative of such intestate, but upon letters of administration, to be obtained in the following manner; *videlicet*, The person claiming such administration, shall give in a note or petition, to the inspector of seamen's wills, stating the name of the deceased, and to what part of his Majesty's dominions he originally belonged, and the name or names of the ship or ships on board of which he served, together with his own name and addition, at full length, and his relation to, or connection with, the deceased, and also what other relations, to the best of his knowledge, the deceased has alive at the time, and where they are resident; and which petition shall be certified by two reputable housekeepers of the parish, town, or place where such petitioner is resident, certifying that they believe the contents of the said petition to be true; and which petition and certificate shall be further certified by the minister of the parish, and two of the churchwardens, or two of the elders, certifying that the two persons who certified the petition, in manner above-mentioned, are resident within the parish, and persons of good repute: whereupon the inspector of seamen's wills, as aforesaid, shall make such enquiry as to him shall appear necessary, for ascertaining the truth of the said petition; and if, upon such enquiry, he shall be satisfied of the truth thereof, and it also appearing that no will of such deceased has been lodged with him, he shall deliver or send, to the person claiming to be such administrator, an abstract of the said petition, with a note or ticket subjoined thereto, signed by the said inspector or person authorised to officiate for him, and marked with his stamp, certifying that the contents of the said petition appear to him to be true, and that the person claiming to be admi-

nistrator, may obtain letters of administration to the deceased, provided he is otherways entitled thereto by law; which certificate shall be directed by the inspector to a proctor in Doctors' Commons, for the purpose that letters of administration may pass in favour of the petitioner, if entitled thereto by law, but not otherways; and such original petition and certificate shall be lodged, and remain in the records of the treasurer of the navy, and be preserved by him; and the letters of administration, when obtained, shall be lodged and registered, in the same manner with the probates of wills, in the hands of the inspector, who is hereby directed to grant a check, signed and stamped by him, or by the person authorised to officiate for him, to the administrators, or their attornies, which shall stand in the place of the administration, and be to them a sufficient authority to demand payment of, and discharge, all sums that shall be due to them as administrators to the party deceased.

VIII. And it is hereby further enacted, That if any proctor, register, or other officer of any ecclesiastical court, shall be aiding and assisting in procuring probate of the will, or letters of administration, for the purpose of enabling any person to receive the wages, pay, prize-money, or allowance of money of any kind, due, or becoming due, for their service on board any ship or ships then in, or formerly belonging to his Majesty, his heirs and successors, without first obtaining the certificate from the inspector of seamen's wills, and letters of attorney, or person authorised to officiate for him, in manner above-directed, every such proctor, register, or other officer, shall forfeit and pay the sum of five hundred pounds, and for ever after be incapable of acting as proctor, register, or in any other capacity, in any ecclesiastical court in Great Britain or Ireland.

IX. And be it enacted, by the authority aforesaid, That the lord high admiral of Great Britain, or the commissioners for executing the office of lord high admiral of Great Britain, shall direct abstracts of this act to be printed, and that a competent number of copies of the said abstracts be delivered to the captain or commander of every ship and vessel of his Majesty, his heirs and successors; and such captain or commander, as soon as the ship or vessel by him com-

Penalty on proctors, &c. assisting in procuring probates of wills, &c. contrary to this act.

Abstracts of this act to be hung up in every ship, and no captain to have his general certificate till the navy board are satisfied it has been done.

manded shall be put into sea pay, shall cause one of the said printed abstracts to be hung up and affixed to the most public place of such ship or vessel, and shall cause the same to be constantly kept and renewed, so that they may at all times be accessible to the petty officers and seamen on board of such ship or vessel; and the commissioners of the navy are hereby charged and directed strictly to enquire whether the directions hereby given for hanging up and affixing the said abstracts, as aforesaid, have been duly observed by the captain or commander of such ship or vessel, and not to grant such captain or commander his general certificate until they are fully satisfied thereof.

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32 Geo. 3. c. 34.

*An Act for explaining and amending an Act passed in the twenty-sixth year of the reign of his present Majesty, intituled, An Act for the further preventing frauds and abuses attending the payment of wages, prize money, and other allowances, due for the service of petty officers and seamen on board any of his Majesty's ships: and for further extending the benefits thereof to petty officers and seamen, non-commissioned officers of marines, and marines, serving, or who may have served, on board any of his Majesty's ships.*

Preamble.  
26 Geo. 3.  
c. 63. re-  
cited.

**WHEREAS** *an Act, passed in the twenty-sixth year of the reign of his present Majesty, (intituled, An Act for the further preventing frauds and abuses attending the payment of wages, prize money, and other allowances due for the service of petty officers and seamen on board any of his Majesty's ships:) and whereas it is just that the provisions of the said Act should be extended to marines serving on board ships*

*in his Majesty's service, and would conduce much to the advantage of the representatives of seamen and marines if the same were further extended, and certain parts thereof explained and amended: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That no letter of attorney, or will, made or executed by any non-commissioned officer of marines, or marine, or letter of attorney made or executed by the executor or executors, or administrator or administrators, of any such non-commissioned officer of marines, or marine, after the first day of August, one thousand seven hundred and ninety-two, shall be good and valid, and sufficient for receiving the whole or any part of the wages, prize money, or other allowances of money due, or which may hereafter become due, to such non-commissioned officers of marines, or marine, for their services in the navy, or to such administrators or executors, as the representatives of such non-commissioned officers of marines, or marine, unless such letter of attorney, and will, shall be made, executed, and attested in the manner and form, and agreeable to the directions in the different events specified and mentioned in the afore-mentioned act, passed in the twenty-sixth year of the reign of his present Majesty; and all letters of attorney, and will, so made or executed by any non-commissioned officer of marines, or marine, for the purpose of receiving and bequeathing all or any part of their wages, prize money, or other allowances due to them, or letters of attorney made by such executor and administrator, for the purpose of receiving money due to him or them, as representative of such non-commissioned officer of marines, or marine, shall be transmitted, inspected, checked, and proved in the same manner, and under the same penalties and forfeitures, as by the act above-mentioned is directed and enacted in regard and with respect to letters of attorney, and wills, made and executed by petty officers or seamen in his Majesty's service, or by the executors and administrators of such petty officers and seamen, in so far as the afore-mentioned act, passed in the twenty-sixth year of the reign of his*

From August 1, 1792, no letter of attorney or will of a non-commissioned officer of marines, or marine, to be valid, unless made according to the recited act, &c.



present Majesty, is not repealed, altered, or amended, by this present act.

Letters of attorney or orders from discharged petty officers, &c. executed within seven miles of a port where seamen's wages are then paid, not valid, unless attested by a clerk of the treasurer of the navy, &c.

II. Provided always, and be it further enacted by the authority aforesaid, That no letter of attorney, or order, made or executed by any petty officer, seaman, non-commissioned officer of marines, or marine, who shall have been discharged from the service of his Majesty, his heirs or successors, and who shall be at or within the distance of seven miles from any of the ports where seamen's wages are paid for such service, at the time of making such letter of attorney, shall be good and valid, and sufficient for receiving the whole or any part of the wages, prize money, or other allowances of money due, or to grow due, to such petty officer, seaman, non-commissioned officer of marines, or marine, for such service, unless such letter of attorney, or such order, shall be signed before and attested by a clerk of the treasurer of the navy at such port, or by the inspector of seamen's wills, and powers of attorney; any thing in the aforesaid act to the contrary thereof in anywise notwithstanding.

Captains to deliver to discharged petty officers, &c. a certificate in the following form.

III. And be it enacted by the authority aforesaid, That, from and after the said first day of August one thousand seven hundred and ninety-two, when and so often as any petty officer, seaman, non-commissioned officer of marines, or marine, shall be in anywise discharged from any ship or vessel in the service of his Majesty, his heirs or successors, the captain or commanding officer of such ship or vessel shall make, or cause to be made out, a certificate in the manner and form following, or to the like effect :

Form of certificate.

No.

*THESE are to certify, That A. B. has served as  
on board of his Majesty's ship  
under my command, from the                      day of  
to the                      day of                      dated the  
of  
A. B. is                      feet                      inches high, is  
of a                      complexion, and aged                      years.*

And which he shall sign with his name, and deliver, or cause

to be delivered; to such petty officer, seaman, non-commissioned officer of marines, or marine, at the time of his being discharged; and no petty officer, seaman, non-commissioned officer of marines, or marine, shall be entitled to receive his wages, pay, or other allowances for services on board any ship or vessel in the service of his Majesty, his heirs or successors, unless at the time of paying such wages, pay, or allowances, he shall be identified by one or more of the commissioned or warrant officers who belonged to the ship or vessel at the time, or during some part of the time, for which he may so claim the payment for such services, or unless he produces a certificate as above described, and directed to be delivered to him as aforesaid; no petty officer, seaman, non-commissioned officer of marines, or marine, who shall be discharged from any ship or vessel in the service of his Majesty, into any other ship or vessel in such service, shall be entitled to receive his wages, pay, or allowances of any kind, for his service on board of the ship to which he shall have last belonged, unless he shall enter and be mustered three times in the ship or vessel into which he shall be so discharged, or appear upon the books of such ship or vessel into which he next goes to be regularly discharged therefrom; or if such petty officer or seaman, non-commissioned officer of marines, or marine, be taken by the enemy, unless he voluntarily return and enter on board some ship or vessel in the service of his Majesty, his heirs or successors, in a reasonable time after he shall be released from prison; or if the ship or vessel in which such petty officer or seaman, non-commissioned officer of marines, or marine, last served be lost or destroyed, and the crew, or any part of the crew, be saved, unless he enters again in a reasonable time on board some ship or vessel in such service; or if such petty officer or seaman, non-commissioned officer of marines, or marine, be discharged from the ship or vessel to which he belonged, to any of his Majesty's hospitals, unless he enters the ship or vessel to which he shall be discharged from such hospital, or be discharged out of the service; or unless, in any of the above specified events, reasonable cause shall be shewn, and allowed by the commissioner of the navy comptrolling such

No petty officer, &c. to be entitled to receive his wages, unless his person be identified by an officer of the ship, or unless he produces such a certificate; or if discharged from one ship into another; or taken by the enemy; or shipwrecked, unless he complies with the regulations herein mentioned.

payment, and the clerk of the treasurer of the navy making the same, for not producing such certificate, or for non-compliance with any thing herein directed.

No petty officer, &c. who has run from a ship shall receive wages unless his mark be taken off.

IV. And be it also enacted by the authority aforesaid, That no petty officer or seaman, non-commissioned officer of marines, or marine, who shall be marked on the books of any ship or vessel in the service of his Majesty, his heirs or successors, as having run therefrom, shall receive his wages, pay, prize money, or other allowances of money for such ship or vessel, unless such mark shall be taken off by order of the commissioners for executing the office of lord high admiral of Great Britain, or by order of the commissioners of his Majesty's navy.

When ships having been twelve or more months in pay, shall arrive where any commissioner of the navy resides, and money shall be issued for paying them, the wages for the time the books are preparing shall be reserved over the six months to be left unpaid pursuant to 31 Geo. 2. c. 10.

V. And be it further enacted by the authority aforesaid, That when and so often as any ship or vessel, having been twelve or more calendar months in sea pay, shall be or arrive in any port of Great Britain where any commissioner of the navy shall be or reside, and money shall have been issued for payment of the wages due upon the books of such ship or vessel, sufficient time shall be allowed for sending to the navy office, preparing, and examining the books of the said ship or vessel; and the wages due to the officers or seamen, non-commissioned officers of marines, or marine, of or belonging to such ship or vessel, for the time during which the said books shall have been examining and preparing (which shall be done without delay) shall be reserved and kept in arrear, over and above the six months ordered to be left unpaid by an act made in the thirty-first year of the reign of his late Majesty King George the Second, intituled, *An Act for the encouragement of seamen employed in the royal navy, and for establishing a regular method for the punctual, frequent, and certain payment of their wages; and for enabling them more easily and readily to remit the same for the support of their wives and families, and for preventing frauds and abuses attending such payments*, any thing therein contained to the contrary notwithstanding.

No letter of attorney to be passed by the inspector, until a cer-

VI. And be it further enacted by the authority aforesaid, That, from and after the said first day of August one thousand seven hundred and ninety-two, no letter of attorney granted by any petty officer, seaman, non-commissioned of-

ficer of marines, or marine, shall be passed, stamped, and allowed of by the inspector of seamen's wills and powers of attorney, until a certificate is produced to him from the captain or captains, or commanding officer or commanding officers of the ship or ships, vessel or vessels, to which the grantor of such letter of attorney at the time belonged, and for which the wages, pay, or allowances to be received by such letter of attorney became due, and which shall be in the manner and form following, or to the like effect :

No.

*THESE are to certify, That A. B. has served as Form ;  
on board of his Majesty's ship  
under my command, from the to the  
dated the of  
A. B. is feet inches high, is  
of a complexion, and aged years.*

unless such power of attorney shall have been made on board the ship or vessel for which he claimed payment for his services as aforesaid, and is executed in the manner or form directed by the before-mentioned act of the twenty-sixth year of the reign of his present Majesty, or unless reasonable cause shall be shewn to and allowed by such inspector of seamen's wills and powers of attorney, or person authorised to act for him, for dispensing with all or any of such certificate or certificates.

unless executed on board agreeably to recited act, or reasonable cause be shewn for dispensing therewith.

VII. Provided also, and be it further enacted by the authority aforesaid, That when any sum, not exceeding the sum of seven pounds, shall be due and payable, by the rules of the navy, to any petty officer or seaman, non-commissioned officer of marines, or marine, in respect of his services in the navy, it shall and may be lawful for such petty officer or seaman, non-commissioned officer of marines, or marine, to give an order in writing for the payment of the same, upon the treasurer of the navy, which order shall be revocable as in the case of powers of attorney, and shall be payable to the person in such order named, or to his order ; and the same shall be attested by the captain or commander, or any other

An order for any sum not exceeding 7l. may be given upon the treasurer of the navy to be attested, &c. as herein mentioned

of the signing officers, or a lieutenant of the ship, on board of which such services were performed, accompanied with a certificate from one of the signing officers or lieutenants of such ship, certifying the particulars of the services of the drawer of such order, and the said order and certificate shall be laid before the said inspector, who shall examine the same, and if he sees no cause to suspect the truth and authenticity thereof, he shall stamp and pass the same for payment; but if he shall see good cause to suspect the truth and authenticity of such order, he shall report the same to the treasurer, or to the paymaster of the navy, and shall enter his caveat against the same, which shall prevent any money from being had and received thereon, until the same shall be authenticated to the satisfaction of the said treasurer or paymaster.

VIII. *And for the better explaining and distinguishing those officers in his Majesty's service who are herein described, and in former acts have been described, inferior or petty officers, and non-commissioned officers of marines; and likewise for the better explaining and distinguishing of that part of the complement on board his Majesty's ships who are herein described, and in former acts have been described, to be seamen and marines,* be it enacted by the authority aforesaid, That all and every part of the said complement of such ship and ships shall be, and are hereby declared to be, petty or inferior officers, seamen, non-commissioned officers of marines, or marine, excepting such as are rated upon the books of such ships, admirals or flag officers, and their secretaries, captains, and lieutenants, masters, second masters, and pilots, physicians, surgeons, chaplains, boatswains, gunners, carpenters, and pursers, captains of marines, captain lieutenants of marines, lieutenants, and quarter masters of marines.

Who are to be deemed petty officers, &c. within the meaning of this and former acts.

Months to be reckoned by the calendar, except in the computation of pay, &c.

IX. And be it further enacted by the authority aforesaid, That all months mentioned in this and preceding acts of parliament, relating to the navy, shall be counted and reckoned calendar months, excepting only in the computation of pay, wages, and other allowances, which shall be computed and cast by reckoning twenty-eight days to the month, according to the usual practice of the navy.

X. *And, for the purpose of more effectually preventing frauds and forgeries in the execution and attesting of letters of attorney, wills, orders, or certificates, made by or in favour of petty officers, seamen, non-commissioned officers of marines, or marine,* be it enacted by the authority aforesaid, That every lieutenant on board any of his Majesty's ships shall, upon a page of every muster book of such ship, sign his name, for the purpose, and for the purpose only, that the inspector of seamen's wills, or such persons as shall be deputed by him, may have the opportunity of comparing the same with the name of any such lieutenant, attesting the will, letter of attorney, certificate, or order, executed by or in favour of any petty officer, seaman, non-commissioned officer of marines, or marine.

Lieutenants to sign their names in muster book for the purpose of being compared with the attestation of wills, &c.

XI. And be it enacted by the authority aforesaid, That all captains and commanders of ships shall, upon their monthly muster books or returns, specify which of the men mentioned in the said returns have granted or issued any will or testament during that month or space of time from the preceding returns, by inserting the date thereof opposite to the party's name.

Captains in the musters to specify which of the men have granted wills in the month.

XII. And be it further enacted, That when and so often as any captain or commander of any ship or vessel shall sail from any foreign station at a time when no opportunity shall offer of transmitting to the navy board the muster books, tickets and lists, by this or other acts of parliament directed to be made out and transmitted, then and in every such case such captain or commander shall leave such muster books, tickets, and lists with the naval officer, if any such officer shall be and reside at such place, or if there shall be no naval officer at such place, then and in that case with some respectable merchant, or other person, with proper directions to forward the same to the principal officers and commissioners of his Majesty's navy, by the first safe opportunity thereafter.

Captains sailing from foreign stations when no opportunity of transmitting musters, &c. offers, to leave them with the naval officer, &c.

XIII. And be it further enacted by the authority aforesaid, That if any captain or commander shall be in any ways removed from any ship or vessel in his Majesty's service, he shall deliver, or cause to be delivered over to his successor, one complete muster book, signed by himself and the proper

Captains when removed, to deliver complete muster books to their suc-

cessors,  
who are to  
give re-  
ceipts for  
the same,  
without  
which no  
general  
certificate  
to be grant-  
ed, &c.

officers, made up to the time of such removal, and for which he shall receive a receipt from the said successor; and the principal officers and commissioners of his Majesty's navy, are hereby strictly directed and required not to grant to any such captain or commander the general certificate to entitle him to his wages, or pay for such ship or vessel, unless such receipt shall be produced to them, or unless thereto required by particular order from the lord high admiral of Great Britain, or from the commissioners for executing the office of lord high admiral of Great Britain, or any three or more of such commissioners, in cases of necessity, and on its being made appear to their satisfaction, that the directions hereinbefore given in this behalf have been complied with, as far as the nature of the service would admit.

Parish mi-  
nisters may  
deliver  
checks,  
transmit-  
ted by the  
inspector  
of seamen's  
wills, to at-  
torneys,  
&c.

XIV. Provided always, and be it further enacted by the authority aforesaid, That it shall and may be lawful for the minister of any parish to whom the inspector of seamen's wills shall transmit his check of any letter of attorney, or will, passed and allowed by him, to deliver the said check to the attorney or executor in the said letter of attorney, or will, named and appointed, any thing contained in the said act passed in the twenty-sixth year of the reign of his present Majesty to the contrary thereof in anywise notwithstanding.

Letters of  
attorney  
and wills  
to be exa-  
mined by  
the inspec-  
tor, who  
shall issue  
checks, or  
in case of  
suspicion  
shall report  
to the trea-  
surer of  
the navy,  
&c.

XV. And be it further enacted by the authority aforesaid, That all letters of attorney, and wills, made prior to the first day of August one thousand seven hundred and eighty-six, by petty officers and seamen belonging to any of his Majesty's ships, or by the executors or administrators of such petty officers and seamen, and every letter of attorney, and will, made by any non-commissioned officer of marines, or marine, or by the executors or administrators of such non-commissioned officers of marines, or marine, prior to the said first day of August one thousand seven hundred and ninety-two, for the purpose of receiving money of any kind in respect of his services in the navy, shall be inspected and examined by the inspector of seamen's wills, for the purpose of preventing frauds, forgeries, or impositions of any kind therein; and if such inspector shall see no cause to suspect the authenticity of the same, he shall affix the stamp of his office

and issue checks for the same; but if he shall see good cause to suspect the truth and authenticity of such letter of attorney, or will, he shall report the same to the treasurer or to the paymaster of the navy, and shall enter his caveat against such letter of attorney, or will, which shall prevent any money from being had and received thereon, until the same shall be authenticated to the satisfaction of the said treasurer or paymaster.

XVI. And be it enacted by the authority aforesaid, That where any petty officer or seaman, non-commissioned officer of marines, or marine, belonging, or who shall have belonged to any of his Majesty's ships, has died or hereafter shall die intestate, leaving any wages, pay, prize money, or allowances of money of any kind due to him, in respect of services in his Majesty's navy, the same shall not be paid, from and after the said first day of August one thousand seven hundred and ninety-two, unto any representative of such intestate, but upon letters of administration, to be obtained in the following manner; viz. The person claiming such administration shall send or give in a note or letter to the inspector of seamen's wills, stating the name of the deceased, the name of the ship or ships to which he belonged, and that he has heard or been informed of his death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased, or to the like effect, upon receipt whereof the inspector of seamen's wills shall deliver or send to the person claiming such administration, a paper in the words and form following, or to the like effect:

Wages of persons dying intestate to be paid only upon administration, obtained in the manner herein mentioned



Form of paper to be delivered by the Inspector, to Representatives of persons dying intestate ;

## LIST.

- |             |                                |
|-------------|--------------------------------|
| 1st Degree— | Widow.                         |
| 2d ———      | Child.                         |
| 3d ———      | Father.                        |
| 4th ———     | Mother.                        |
| 5th ———     | Brother or Sister.             |
| 6th ———     | Grand-father, or Grand-mother. |
| 7th ———     | Uncle, Aunt; Nephew, or Niece. |
| 8th ———     | Cousin-german.                 |
| 9th ———     | Cousin-german, once removed.   |
| 10th ———    | Second-cousin.                 |

SIR,

*HAVING obtained information, That A. B. born about the year 17 at and belonging to his Majesty's ship about the year died at in the month*

*of 17 without leaving any will, to the best of my knowledge and belief; I now apply for a certificate to enable me to obtain letters of administration to his effects, being his and { sole, or } one of his } nearest of kin, no one, to the best of my knowledge and belief, of a nearer degree being living, at the time of the death of the said deceased, who died a { bachelor } or widower }*

*My place of abode is*

C. D.

*WE hereby certify, That we personally know the above subscribing C. D. and believe what { he } { she } has stated to be true.*

E. F.

G. H.

*Both inhabitants of the parish of the county of*

in

No.

*WE hereby certify, That the above E. F. G. H. are known to us, are house-keepers, and persons of good repute.*

*Witness our hands,*

*Dated at this of*

*day }*

I. K. Minister.

L. M. { Churchwardens

N. O. { or Elders.

**N. B.** If the person applying, is the widow of the party deceased, she must forward, herewith, an extract from the parish register, or some other authentic proof of her marriage.

If the deceased died after he had left the naval service, an extract from the parish register, of his burial, or some other authentic proof of his death, must likewise be sent to this office.

If the person applying, knows any proctor in Doctors Commons, { <sup>she</sup> or he } is desired to mention his name, that he may be employed in obtaining the letters of administration.

This application, when filled up and attested, is to be sent by the general post, under cover, directed to the treasurer, or to the paymaster of his Majesty's navy, London.

And upon the receipt of the said paper, the person claiming such administration, shall fill up, or cause to be filled up, the several blanks in the first part of the said paper, according as the truth may be, and shall duly subscribe the same; and two inhabitants of the parish within which the person claiming such administration shall reside, shall sign the first certificate on the said paper, having previously filled up the blanks therein, agreeably to the truth; after which, the minister and two churchwardens, if in England; and two elders, if in Scotland, shall sign the second certificate, upon the aforesaid paper, the blanks therein being first filled up agreeably to the truth; and the said paper being in all things completed, according to the directions thereon, and hereby given, the same shall be returned, addressed to the treasurer, or to the paymaster of his Majesty's navy, London, who, upon receiving the same, shall direct the inspector of seamen's wills, to examine the same, and make such enquiry relative thereto, as may appear to him necessary on that behalf, and being satisfied, he shall forthwith make out a certificate in the following form, or to the like effect :

which must be filled up and certified; and if the inspector be satisfied, he shall make out a certificate in the following form.

*Act of Parliament, 32 George III. ch. 34.*

No.

**CERTIFICATE to obtain LETTERS of  
ADMINISTRATION.**

*Navy Pay-office.*

Form of  
certificate.

*HAVING duly examined an application, made to this  
office, by C. D. of \_\_\_\_\_ and  
county of \_\_\_\_\_ stating that  
{ she } is the { sole, or one } next of kin of A. B. originally  
{ or he } { of the }  
of \_\_\_\_\_ and late a { seaman }  
belonging to his Majesty's ship { marine }  
and who died intestate, a { bachelor, or } upon the  
widower }  
day of \_\_\_\_\_ and without leaving any  
one of a superior degree of kindred to him; and it appearing  
that no will of the deceased has been lodged in this office, I  
therefore grant this abstract of said application, and certify,  
that I believe what is therein stated, to be true, and also that  
the said C. D. may obtain letters of administration to the ef-  
fects of the said deceased, which appear not to exceed the sum  
of \_\_\_\_\_ pounds; provided always that { he or }  
is otherwise entitled thereto by law. { she }*

**I. P. Inspector.**

**To**

**Proctor in Doctors' Commons.**

**N. B.** The previous commission or requisition is to be ad-  
dressed agreeably to the superscription of the within cover,  
in which the same is to be enclosed, and forwarded by the  
proctor; and when the commission or requisition shall be  
returned to this office, it will be forwarded to him, and he  
is then to sue out letters of administration, and send them to  
the inspector, with his charge noted thereon.

Certificate  
to be ad-  
dressed to

And after filling up the blanks therein, as the case may be,  
shall sign and address the same to a proctor, or proctors, in

Doctors' Commons, the said inspector of seamen's wills, shall, at the same time, inclose and send with such certificate, a letter, addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the person applying for such letters of administration then resides; and the treasurer, or the paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter, so as to carry the same, and the previous commission, or requisition, to be inclosed therein, free of the charge for postage, and which letter so to be addressed to the minister, and to the churchwardens, or elders, as the case may be, shall be in the words, figures, and form following, or to the like effect:

a proctor, with a letter from the inspector in the following form.

No.

*Navy Pay-office,*

*day of*

*Rev. SIR,*

*HAVING received an application, attested by you, and two { churchwardens } of your parish, from C. D. also of your { or elders } Form of the letter, parish, stating that { she } is the and { or he } { sole, or } next of kin of A. B. late a { seaman or } belonging { one of the } to his Majesty's navy, and requesting leave to administer to his effects;*

*I am directed by act of parliament, of the thirty-second of George the third, ch. 34. to forward you the enclosed { commission or } for the purpose of swearing { him } accord- { requisition, } ingly: provided, to the best of your knowledge and belief, { she } answers the description contained in the same. { or he }*

*I am, Rev. SIR,*

*Your most obedient Servant,*

*I. P. Inspector.*

*P. S. When the { commission or } is executed, you will please { requisition } to return it, addressed*

*To the treasurer, or*

*To the paymaster of his Majesty's navy, London;*

*And specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the person applying, who will be directed to pay { <sup>her</sup> or him } the wages due to the deceased.*

**To A. B.**

*Minister of the parish of*

**N. B.** If the application above-mentioned, was not attested by you, as stated therein, be pleased to return the enclosed { commission or requisition } immediately, that means may be taken to discover the imposition.

Proctor, on receiving certificate and letter, to sue out a previous commission, and to transmit the same, with the letter, to the minister.

And the inspector, before he sends such certificate, as before directed, to the proctor, in Doctors' Commons, shall fill up the blanks therein, agreeably to the circumstances of the case; and the proctor or proctors to whom such certificate shall be addressed and sent, and which shall likewise enclose the letter to the minister, churchwardens, or elders, as aforesaid, shall, immediately upon receipt of the same, sue out the previous commission or requisition, or take such other proper and legal steps, as may be necessary towards enabling the person so applying for letters of administration, to the deceased intestate, to obtain the same, and shall enclose such previous commission or requisition, or other legal and necessary instrument, with instructions for executing the same, in the letter so to be addressed to the minister and churchwardens, or elders, and which had been transmitted to him by the inspector of seamen's wills, along with the aforesaid certificate, and shall forward such letter and inclosure as aforesaid, by the general post, agreeably to the address put thereon by the treasurer of the navy, the paymaster of the navy, or the inspector of seamen's wills.

Ministers, on receiving such commissions, to procure the execution of them, and transmit them to the pay office.

**XVII.** And be it enacted, by the authority aforesaid, That the minister and churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter as aforesaid, with the previous commission or requisition, or other instruments inclosed therein, take such steps as to them may seem proper or necessary, for procuring the execution of such previous commission or requisition, or other instru-

ment transmitted by the proctor, to be executed, and being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such letters of administration shall be, and reside at a distance from the place where the wages, prize-money, or other allowances of money due to the deceased, are payable, he or they shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient, or nearest to such person applying for such administration; and the said treasurer, or paymaster of his Majesty's navy, shall, immediately upon the receipt thereof, send the said previous commission or requisition, or other legal instrument, executed by the person applying for the administration as aforesaid, to the aforesaid proctor, in Doctors' Commons, who, in pursuance thereof, shall forthwith sue out, and procure, letters of administration, in favour of the person so applying for the same, in the manner and form above-mentioned, to the estate and effects of the person who has so died intestate, as aforesaid.

Persons living at a distance from places where wages are paid, to describe the nearest receiver-general of the land-tax, &c.

Treasurer of the navy to send the previous commission when executed to the proctor, in order that letters of administration may be obtained.

XVIII. And be it enacted, by the authority aforesaid, That where any petty officer, seaman, non-commissioned officer of marines or marine, belonging, or who shall have belonged to any of his Majesty's ships, has died, or hereafter shall die, and shall have left a will or testament, appointing any executor or executors therein, any pay, wages, prize-money, or allowance of money, which may have been due, or owing to such testator, at the time of his death, shall not be paid over to, or recovered by, such executor or executors, but upon probates of such wills, to be obtained in the following manner; (*videlicet*) after such wills shall have been transmitted, inspected and lodged in the office of the treasurer of the navy, as directed by the afore-mentioned act of the twenty-sixth year of the reign of his present Majesty, the inspector of seamen's wills, and powers of attorney, shall issue, or cause to be issued, a check, in lieu thereof, with directions to return the same upon the testator's death, and to which check there shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish, where such executor is resident, at the time such certificate

Executors to obtain probates of wills in the manner herein directed.

shall be so returned to the pay-office of the treasurer of the navy, certifying that they personally know and believe that he is the person described as executor in the said check; and also another blank certificate, to be signed by the minister of the said parish, and two of the churchwardens, or two elders of the same, as the case may be, certifying, that such two persons who certified, as above-mentioned, are resident within the parish, and of good repute; and such check and certificates shall be in the form and words following, or to the like effect:

No.

CHECK.

Form of  
check to be  
given, on  
lodging  
wills at the  
navy pay-  
office.

*IT being directed by acts of parliament, twenty-sixth George 3. chap. 63. and thirty-second George 3. chap. 34. That wills granted by petty officers and seamen, non-commissioned officers of marines, and marine, belonging to his Majesty's navy, shall be lodged in this office, for purposes therein specified; and that a check shall be issued for every such will, mentioning the particular heads thereof, which, by virtue of the said act, shall stand in place of the same;*

*this is therefore issued to shew receipt at this office,*  
of a will,                      dated at                      upon the

day of                      granted by A. B.

now of                      formerly of his Majesty's ship  
in favour of C. D. and appointing E. F.

*execut<sup>r</sup> or<sup>r</sup> } and which is attested by G. H. and I. K. The above E. F. upon the testator's death, is entitled, upon production of this check, to demand of this office, the wages, pay, or any other allowances due to the deceased; and that the above-mentioned will be directed and sent to a proctor, in Doctor's Commons, to obtain a probate thereof, which is also to be lodged in this office.*

*WE hereby certify, That we personally know the above described E. F. the present holder of this check; and that he is an inhabitant of this parish.*

L. M.

N. O.

*Both inhabitants of the parish of  
in the county of*

*WE hereby certify, That the above L. M. and N. O. are known to us, are housekeepers, and persons of good repute.*

*Witness our hands,*

At this of	}	P. Q. Minister. R. S. { Churchwardens } T. U. { or Elders. }
------------------	---	--

If the testator dies after he leaves the naval service, a certificate of his burial, or some other authentic proof of his death, must likewise be sent to this office.

If the execut<sup>or</sup> {<sub>vix</sub>} knows any proctor in Doctor's Commons, {<sup>he</sup><sub>or she</sub>} is desired to mention his name, that he may be employed in obtaining the probate.

The above certificates are to be filled up upon the testator's death, and the check to be sent by the general post, under cover, directed to the treasurer, or to the paymaster of his Majesty's navy, London.

And the said check having been, with the certificates, duly filled up, returned to the treasurer of the navy, or to the paymaster of the navy, in the event of the testator's death, and the said original will having been passed and stamped in the manner specified and directed by the aforesaid act, passed in the twenty-sixth year of the reign of his present Majesty, the inspector of seamen's wills, or the persons authorised to act for him, shall note thereon the amount of the wages due to the said deceased, and shall forward the said will to such proctor, or proctors, in Doctor's Commons, as aforesaid, together with a letter, addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the said executor or executors, applying for such probate of will, shall then reside; and the treasurer, or the paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter, so as to carry the same, and the previous commission, or requisition, to be inclosed therein, free of charge for postage; and which letter, so to be addressed to the minister and churchwardens, or elders, as the case may be, shall be in the words, figures, and form following, or to the like effect:

On return of checks, &c. to the pay-office, the inspector to note the wages due, and forward the will to the proctor, with a letter in the following form.



No.

Navy Pay-office,

181

Rev. SIR.

Form of  
the letter.

*HAVING received a check, formerly issued by this office, to which there are certificates annexed, attested by you, and two { churchwardens } or elders } of your parish, certifying that C. D. also of your parish, is the person described in the said check, to be the execut { or } rix } to A. B. late a { seaman } { marine } belonging to his Majesty's navy, and requesting that a probate of the will of the said A. B. may be granted.*

*I am directed by act of parliament, of the thirty-second of George the third, chap. 34. to forward you the enclosed { commission } { requisition } and copy of the will, for the purpose of swearing the person so named execut { or } rix } accordingly.*

I am, Rev. SIR,

Your most obedient servant,

I. P. Inspector.

*P. S. When the { commission } { requisition } is executed, you will please to return it, together with the copy of the will, addressed*

*To the treasurer, or**To the paymaster of his Majesty's navy, London.*

*And specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the execut { or } rix } who will be directed to pay { him } { her } the wages due to the deceased.*

To A. B.

*Minister of the parish of*Proctor on  
receiving  
the will  
and letter,  
to sue out  
a previous

And the said proctor having received the said will, and the said letter, so written by the inspector, shall immediately sue out the previous commission, or requisition, or take such other proper and legal steps as may be necessary, towards

enabling the said executor, or executors, so applying for probate of the said will, to obtain the same, and shall enclose such previous commission, or requisition, or other legal and necessary instrument, with instructions for executing the same, as also a copy of the said will, in the letter so to be addressed to the minister, churchwardens, or elders, and shall forward such letter and enclosures as aforesaid, by the general post, agreeably to the address put thereon by the treasurer of the navy, by the paymaster of the navy, or by the inspector of seamen's wills.

commission, and to transmit the same with the letter to the minister.

XIX. And be it enacted, by the authority aforesaid, That the minister, and the churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter, as aforesaid, with the previous commission, or requisition, or other instruments, enclosed therein, take such steps as to them may seem proper or necessary for procuring the execution of such previous commission, or requisition, or other instrument, directed by the proctor to be executed, and the same being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such probate of will, shall be, and reside at a distance from, the place where the wages, prize-money, or other allowances of money, due to the deceased, are payable, he, or they, shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient, or nearest to the person applying for such probate; and the said treasurer, or paymaster of his Majesty's navy, shall immediately, upon receipt thereof, send the said previous commission, or requisition, or other legal instruments, executed by the person applying for the probate, as aforesaid, to the aforesaid proctor in Doctors' Commons, who in pursuance thereof shall forthwith sue out and procure such probate.

Ministers, on receiving such commissions, to procure the execution of them, and transmit them to the pay office.

Persons living at a distance from places where wages are paid, to describe the nearest receiver-general of the land-tax; and treasurer of the navy to send the previous commission, when executed, to the proctor to obtain probates.

XX. And be it enacted, by the authority aforesaid, That when any person or persons, alleging him, her, or themselves to be creditor or creditors of any petty officer, seaman, non-commissioned officer of marines, or marine, dying intestate, or leaving a will, of which the executor or executors shall renounce the execution, or shall refuse to act thereupon,

Creditor desirous of administering to petty officers, seamen &c. must apply to the inspector of seamen's wills

and state  
the amount  
of his de-  
mand, &c.

shall, in that character be desirous of procuring letters of administration, or letters of administration, with will annexed, in order to receive any wages, pay, prize-money, or other allowances of money, of any kind, due to such petty officers or seamen, non-commissioned officers of marines or marine, in respect of services in his Majesty's navy, the same shall not be paid unto any such creditor or creditors as aforesaid, but upon letters of administration, or letters of administration, with will annexed, to be obtained in the following manner; (*videlicet*) such creditor or creditors shall apply by letter, or note, to the inspector of seamen's wills, stating the nature and amount of his demand; and if the person, upon whose account the wages, pay, prize-money, or other allowances are due, shall have died after he left the naval service, such creditor shall also exhibit a satisfactory proof of such death; and if he knows any proctor in Doctors' Commons, whom he may wish to employ, he shall mention his name to the said inspector, who shall further require a certificate, signed by two reputable housekeepers of the parish, where such creditor is resident, certifying, that they personally know him, and believe that he is the person whom he describes himself to be, and also another certificate from the minister of the said parish, and two of the churchwardens, or two of the elders of the same, as the case may be, certifying that such two persons who signed and certified, as above-mentioned, are resident within the parish, and of good repute; and upon receiving such certificates, together with a stated account, in writing, of such creditor's demand, he shall sign his name to such account, exhibited by such creditor, and shall also put a stamp thereon, in token of his approbation thereof; and every such account, and the vouchers exhibited by such creditor, shall be kept by the said inspector, as vouchers of the accounts of the treasurer of the navy, and such inspector shall immediately make, or cause to be made out, a certificate, stating the nature and amount of such creditor's demand upon the estate of such petty officer, seaman, non-commissioned officer of marines, or marine, as aforesaid, deceased, and shall sign and stamp, and forward the same to the proctor, or proctors, in Doctors' Commons, as shall have been named by such creditor, and he shall also

Inspector  
to sign the  
account,  
and make  
out a certi-  
ficate of  
the de-  
mand, and  
forward it  
to a pro-  
ctor, with a  
letter in  
the follow-  
ing form.

enclose, and send therewith a letter, addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the person applying as creditor, for such letters of administration then resides, and the treasurer, or paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter so as to carry the same, and the previous commission, or requisition, or other necessary instruments to be inclosed therein, free of the charge for postage, and which letter so to be addressed to the minister, and to the churchwardens, or elders, as the case may be, shall be in the following words, figures, and form, or to the like effect :

No.

*Navy Pay-office,*

181

*Rev. SIR,*

*HAVING received certificates, attested by you, and two { churchwardens } of your parish, from C. D. stating that he is resident therein, and desiring to administer to the effects of A. B. late of his Majesty's navy, as his creditor :* Form of letter.

*I am directed by act of parliament of the thirty-second of George the third, ch. 34. to forward you the enclosed { commission } { requisition } for the purpose of swearing him accordingly.*

*I am, Rev. SIR,*

*Your most obedient servant,*

*I. P. Inspector.*

*P. S. When the { commission } { requisition } is executed, you will please to return it, addressed*

*To the treasurer, or*

*To the paymaster of his Majesty's navy, London.*

*And specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the above creditor, who will be directed to pay that part of the wages due to the deceased, which { she } { he } appears by law entitled to receive.*

*To A. B.*

*Minister of the parish of*

Proctor to take the necessary steps to enable the creditor to obtain letters of administration, &c.

And the proctor, or proctors, to whom the aforesaid certificate shall be addressed and sent, and which shall likewise enclose the letter to the minister, churchwardens, or elders, as aforesaid, shall immediately, upon receipt of the same, sue out the previous commission, or requisition, or take such other proper and legal steps as may be necessary, towards enabling the person so applying as creditor, for letters of administration to such deceased, to obtain the same, and shall enclose such previous commission, or requisition, or other legal and necessary instruments, with instructions for executing the same, together with a copy of the will, in cases of administration with the will annexed, in the letter so to be addressed to the minister, churchwardens, or elders, and shall forward such letter and inclosures as aforesaid, by the general post, agreeably to the address put thereon, by the treasurer of the navy, paymaster of the navy, or the inspector of seamen's wills, and if it shall be necessary to cite the next of kin, notice of such citation shall be previously given to the said inspector, who shall point out one or more public papers, in which such citation shall be inserted.

Ministers and churchwardens to take the steps necessary for executing instruments, as directed by the proctor, and to transmit them to the treasurer of the navy, &c.

XXI. And be it further enacted, by the authority aforesaid, That the minister and churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter, as aforesaid, with the previous commission, or requisition, or other instruments inclosed therein, take such steps as to them may seem proper or necessary, for procuring the execution of such previous commission, or requisition, or other instrument, directed by the proctor to be executed, and, being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such administration, shall be, and reside at a distance from, the place where the wages, prize-money, or other allowances of money, due to the deceased, are payable, he or they shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient, or nearest to such person, claiming such administration; and the said treasurer, or paymaster of his Majesty's navy, shall, immediately upon receipt thereof, send the said previous commission, or requisition,

Treasurer to send such instruments

or other legal instruments, executed by the person applying for the administration as aforesaid, to the aforesaid proctor, or proctors, in Doctors' Commons, who, in pursuance thereof, shall forthwith sue out, and procure, letters of administration, in favour of the person so applying, as creditor for the same, in the form and manner above-mentioned, to the estate and effects of the person who has died as aforesaid; but which letters of administration may, and shall, only entitle such administrator, as creditor, to receive such part of the estate of such petty officer, seaman, non-commissioned officer of marines, or marine, as shall satisfy the amount of the claim or demand, made by him as aforesaid, together with expences incurred in establishing his right as aforesaid, to receive the same, and the balance of such intestate's estate, (if any,) after satisfying the demand of such creditor, and expences incurred, shall remain in the hands of the treasurer of the navy, subject to the claim and demand of any other creditor, next of kin, or executor, to take and receive the same, when legally authorised so to do.

to the proctor, that letters of administration may be obtained.

Balance; after paying the claim of the creditor administering, to remain with the treasurer, &c.

XXII. And be it further enacted, That as soon as any letters of administration, or probates of wills, or letters of administration, with will annexed, have been obtained, and passed the seal of the proper court, in the manner herein-before directed, in the different events herein-before specified, the proctor, or proctors, who have sued out the same, shall immediately send such letters of administration, or probates of wills, or letters of administration, with the will annexed, addressed to the treasurer, or to the paymaster of his Majesty's navy, together with an account of his or their charges and expences, in obtaining the same, which said charges and expences shall not exceed the sum or sums herein-after allowed to be charged, in the different events herein-after specified; and the said treasurer, or paymaster of his Majesty's navy, upon receiving such letters of administration, or probates of wills, or letters of administration, with will annexed, shall direct the inspector of seamen's wills, or the person authorised to act for him, to issue, or cause to be issued, a check, containing the heads of such letters of administration, or probate of will, or letters of administration, with will annexed, as the case may be; and

As soon as letters of administration have been obtained and passed, the proctor to send them to the treasurer, or paymaster of the navy, who are to direct the inspector to issue a check, &c.

the said inspector, or the person authorised to act for him, shall note thereon the amount of the said proctor, or proctor's charges and expences, provided the same shall be at, and after the rates herein-after allowed to be charged, and likewise specify and describe upon the said check, the revenue officer, or clerk of the check, residing as aforesaid, nearest to the administrator, or executor, so to be named in such check, if such communication shall have been made to him; and in cases of letters of administration, or letters of administration, with will annexed, granted to creditors, he shall also note upon such check the amount due to such creditors, and which check, of letters of administration, or letters of administration, with will annexed, so prepared, shall be delivered over by him to the said administrator, and which check of probate of will shall be delivered over by him to the said executor, together with the copy of the will which had been transmitted to him by the proctor, or proctors, in Doctors' Commons, the said copy being first stamped by the inspector, if the said administrator, or the said administrator, with the will annexed, or the said executor, as the case may be, shall be present, or demand the same in person, but if he shall not be present, but be and reside at a distance, then, and in that case, the said inspector shall deliver such check, and such copy of will, to the deputy paymaster, and which shall be in the following form, or to the like effect :

No.

CHECK.

*Navy Pay-office,**day of*Form of  
check.

*IT being directed, by acts of parliament, twenty-sixth George the third, chap. 63. and thirty-second George the third, chap. 34. that letters of administration, and probates of wills, granted to the representatives of petty officers and seamen, non-commissioned officers of marines, and marines, belonging to his Majesty's navy, shall be lodged in this office, as vouchers to the treasurer, for payments made thereon; and that a check shall be issued for every such administration, and probate of will, and administration, with will annexed, specifying the particular heads thereof; which, by virtue of the said act, shall stand in place of the same;*

*This is therefore issued to shew receipt at this office of*  
 { Letters of administration  
 { Probate of will  
 { Letters of administration, with will annexed. } *granted to C. D. of*  
*in the county of*  
*as* { Administrator  
 { Executor  
 { Administrator with will annexed } *of A. B. late of his Majesty's*  
*ship* *dated* *day of*

No.

*Remittance bill to be addressed to*  
*at*  
*The aforesaid* { Letters of administration  
 { Probate of will  
 { Letters of administration, with will annexed } *were*  
*sued out by*  
*Proctor in Doctors' Commons, whose charges amount to*  
*I. P. Inspector.*

*To the deputy paymaster of the navy.*

XXIII. Provided also, and be it further enacted, by the authority aforesaid, That where any sum, not exceeding the sum of ten pounds, shall be due for the services as aforesaid, of any petty officer or seaman, non-commissioned officer of marines, or marine, deceased, in order that the widow, next of kin, creditor, or person named as executor in any will or testament, of such petty officer or seaman, non-commissioned officer of marines, or marine, may not be put to great expence, it shall and may be lawful for the inspector of seamen's wills, after having taken the previous steps to ascertain the justness of their respective claims, to probate, or administration, or administration with will annexed, (in like manner as he has been herein-before directed to take, in cases of granting certificates to Doctors' Commons, for letters of administration, or letters of administration, with will annexed, or for probates of wills,) to issue, or cause to be issued, a certificate, in the following form, or to the like effect:

If the sum due exceeds not 10l. the inspector to issue a certificate.



*Act of parliament, thirty-second George the third, chap. 34.  
No.*

### CERTIFICATE.

*Navy Pay-office,                      day of*

*Form of  
certificate.*

*HAVING duly examined a claim, presented to me as  
inspector of seamen's wills, &c. by A. B. of  
in the county of                      stating that { he }  
is the                      of C. D. originally of  
and lately a { seaman } belonging to his Ma-  
jesty's ship                      and who died at  
on the*

*I therefore hereby certify, That I believe the contents as  
therein stated, to be true, and also, that the said A. B. is en-  
titled to receive whatever wages, prize-money, and other al-  
lowances of money, may be due to the said deceased, provided  
the amount thereof does not exceed the sum of ten pounds,*

*Remittance bill to be addressed to  
at*

*I. P. Inspector,*

*To the deputy paymaster of the navy, who shall take care  
to note hereon all sums which he shall pay, or cause to be  
paid, upon the authority of the same.*

*Certificate  
to be deli-  
vered to  
the widow,  
&c. if pre-  
sent, other-  
wise to the  
deputy  
paymaster.*

*And which certificate, so prepared, shall be delivered over  
by him to the said widow, next of kin, creditor, or person  
named as executor, if he or they shall be present; but if he  
or they shall not be present, but be and reside at a distance,  
then, and in that case, the said inspector shall specify and  
describe, upon the said certificate, the revenue officer, re-  
siding as aforesaid, nearest to such widow, next of kin, cre-  
ditor, or person named as executor, and shall deliver such  
certificate to the deputy paymaster.*

XXIV. And be it further enacted, That the said deputy paymaster, upon receiving such check, or such certificate, addressed to him, as the case may be, shall cause the whole of the wages due thereon, to be calculated and ascertained in the usual manner, in which calculation, consideration shall be had to the proctor's charge, if any such charge shall have been incurred, which shall be abated and deducted from the said wages, and be immediately paid to the said proctor, or some person authorised to receive the same on his behalf; and the amount due on such check, or certificate, as the case may be, being so ascertained, and the proctor's charge, where there may be any, being so deducted, the net balance, or that part of the net balance which may be due to the administrator, executor, widow, next of kin, or person named as executor, or creditor, shall immediately be paid to him or them, if he or they shall be present; and the check, or certificate, upon which the same was so paid, shall also be delivered to him or them, that it may be and remain in his or their hands, and stand in place, and instead of letters of administration, or probate of the will, or letters of administration, with will annexed, as an authority to receive whatever other sums may be due, or become due, to the estate of such deceased.

XXV. And be it further enacted, That in case the said executor or administrator, widow, next of kin, or creditor, or person named as executor, shall not be present, but be and reside at a distance, the said deputy paymaster, or treasurer's clerk, shall make out, or cause to be made out, a remittance bill, or bills, for the net balance, or that part of the net balance ascertained, as aforesaid, and which shall be in the following form, or to the like effect;

Deputy paymaster, on receiving checks, or certificates, to compute the wages due, and the balance to be paid, &c.

If the party reside at a distance, a remittance bill to be made out for the balance.

No.

Day of

SIR,

Form of re-  
mittance  
bill.

PAY to B. C. of

on { his  
her  
their } £. s. d.

producing and delivering the duplicate hereof,  
the sum of being an ac-  
count of the wages of D. E. belonging to his Ma-  
jesty's ship the if the same be de-  
manded within six calendar months from the date  
hereof, otherwise you are to return this bill to the  
treasurer of the navy, at the pay office of the navy,  
London.

To { The receiver general of the land tax in the  
county of  
The collector of the customs at the Port of  
The collector of the excise at  
The clerk of the check at }

Signed F. G. Commissioners of the navy.

Attested H. I. Clerk to the treasurer of the navy.

By virtue of the act of the thirty-second of George the third.

N. B. The personating or falsely assuming the name and character of any person entitled to receive the wages of any inferior officer or seaman, non-commissioned officer of marines or marine, or procuring any other to do the same, in order to receive wages due to such officer or seaman, non-commissioned officer of marines or marine, is made felony without benefit of clergy, by the thirty-second of George the third.

The officer to whom the within bill is addressed, is directed by act of 32 Geo. 3. chap. 34. to examine the duplicate thereof when presented, and inquire into the truth, by the oath of the person presenting the same; and being satisfied, he is to testify to that purpose upon the back of the bill, and pay the amount without fee or reward; but if he shall not be able to

pay the amount, from not having public money sufficient in his hands, he shall note the cause of his refusing payment, and shall appoint another day, within one month at furthest from that time, and shall deliver back the bill, so noted, to the person presenting it. And if, upon complaint to the commissioners, it shall appear that the officer to whom this is addressed has unnecessarily delayed payment, taken any fee, or made any deduction whatsoever, he shall be fined a sum not exceeding fifty pounds.

And which bill shall be signed, attested, forwarded and transmitted in the manner directed in cases of parties desiring their wages to be remitted at the pay of a ship, by the aforesaid act, passed in the thirty-first year of the reign of his late Majesty; and which remittance bills shall be made payable to such persons only as shall be expressed as administrators, executors, widows, next of kin, or creditors, in the check or certificate issued as before directed by the inspector; and all the money payable by the treasurer of the navy upon such check of administration or probate of will, with copy of will annexed, being made into a remittance bill or bills, the treasurer's clerk shall examine the said check, and if it shall appear that there are no further sums due by the said treasurer of the navy, but that the full sum due by him upon such authority has been paid and satisfied, his said clerk shall inclose the said check, together with the said copy of will, in the letter or cover which contains the bill of remittance, and forward it by the same conveyance to the administrators or executors, widows, next of kin or creditors, that it may be and remain in their hands, and stand in place and in stead of the original administration or probate of the will, as an authority to receive whatever other sums may be due or become due to the estate of such deceased.

XXVI. And be it enacted by the authority aforesaid, That as soon as the duplicate of any remittance bill or bills made out in favour of or granted in the manner herein-before directed in the different events specified, to any administrator, executor, widow, next of kin, creditor or person named as executor to any petty officer, seaman, non-commissioned officer of marines or marine, shall be produced and delivered

Remittance bill to be signed, &c. as in cases of parties desiring wages to be remitted at the pay of a ship, by 31 Geo. 2. c. 10, &c.

On production of the duplicate of a remittance bill to any receiver general of the land tax, &c. within 6 months

from the date, he shall examine into the truth of it upon oath, and pay the same without fee; but if not produced within six months the same shall be returned to the treasurer of the navy, &c.

to any receiver general of the land tax, collector of the customs, collector of the excise or clerk of the check, in Great Britain respectively, within six calendar months from the date thereof, he is hereby required and enjoined to examine such duplicate, and enquire into the truth thereof, by the oath of the person producing the same, which oath he is hereby authorised and directed to administer, and upon being duly satisfied to testify the same on the back of such bill, and immediately to pay the person or persons to whom such bills shall be made payable, and who shall be entitled to receive the same, without fee or reward on any pretence whatsoever, the sum contained in such bill, taking his, her or their receipt for the same on the back thereof, which bill so paid, upon being produced and delivered, together with the duplicate thereof, at the navy office, shall be immediately assigned for payment by three or more commissioners of the navy, and shall be immediately repaid by the treasurer of the navy to such receiver general of the land tax, collector of the customs, collector of the excise, clerk of the check, or to the order of any of them respectively, who shall have paid such bill; but in case the duplicate of such bill shall not be produced and delivered, and the payment thereof be demanded within six calendar months from the date thereof, then the said receiver general of the land tax, collector of the customs, collector of the excise or clerk of the check, shall return such bill to the treasurer of the navy, who shall cause such bill to be immediately cancelled, and from and after the cancelling thereof, the sum so contained in such bill shall accrue and become payable to such executor, administrator, widow, next of kin, creditor, or person named as executor to such inferior officer or seaman, non-commissioned officer of marines or marine for whose wages or pay it was made out, or to their lawful representatives in case they shall be dead, in the same manner as if such bill had never been issued.

If Receiver general, &c. shall not have money in hand when duplicates are tendered, he shall appoint a

XXVII. Provided always, and it is hereby further enacted by the authority aforesaid, That if any such receiver general of the land tax, collector of the customs, collector of the excise or clerk of the check to whom the duplicate of any of the bills herein-before directed to be made out and addressed to him as aforesaid shall be tendered for payment,

shall not then have in his hands public money sufficient to answer the same, and shall for that reason refuse or delay the immediate payment thereof; such receiver general, collector of the customs, collector of the excise, or clerk of the check, shall immediately indorse on the back of the said duplicate the day of its being so tendered to him, and the cause of his refusal or delay to pay the same, and shall appoint thereon, for the payment of such bill, some future day, within the space of one month at the farthest from the day of its having been first tendered to him as aforesaid, and such duplicate, with the indorsement thereon, shall immediately be delivered back to the person presenting the same; and if upon complaint to be made to the respective commissioners appointed by his Majesty, his heirs or successors, to manage the said several duties of the land tax, customs or excise, or to the commissioners of the navy, if the person complained of be a clerk of the check, it shall appear that such receiver general, collector of the customs, collector of the excise, or clerk of the check hath unnecessarily and wilfully refused or delayed the payment of such bill, or that such receiver general, collector of the customs, collector of the excise or clerk of the check, or any person employed by or under any of them, hath directly or indirectly received or taken any fee, reward, gratuity, discount or deduction whatsoever, on account of the payment of the said bill, it shall and may be lawful to and for any three or more of the said commissioners to convict and fine any such offender under their respective direction in any sum not exceeding fifty pounds, according to the nature and degree of the offence; and such fine shall be levied and recovered in such and the same manner, to all intents and purposes, as any conviction may be made, and any penalty or fine may be levied and recovered for any offence against any law by which any custom or excise is imposed or laid; and the said fine, when recovered, shall be paid to the informer or informers against such offender or offenders.

day for  
payment  
within a  
month, &c.

Penalty on  
receiver  
general,  
&c. delay,  
ing pay-  
ment, or  
taking  
fees.

XXVIII. And be it further enacted, That all and every such bill and bills, duplicate and duplicates respectively herein-before directed to be made out and paid as aforesaid, shall be deemed and taken as good and sufficient vouchers

Bills and  
duplicates  
to be allow-  
ed in pass-  
ing the ac-  
counts of

the treasurer of the navy.

for the treasurer of the navy for so much money as shall have been so directed to be paid upon all or any such bill or duplicate respectively, and as shall have been paid by him thereon, and shall be allowed as such in passing his accounts.

Persons forging certificates, checks, &c. to suffer death.

XXIX. And be it further enacted, That if any person, from and after the first day of August one thousand seven hundred and ninety two, shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act and assist in the false making, forging or counterfeiting any petition for a certificate, herein-before described or mentioned, to enable any person or persons to obtain letters of administration to any petty officer or seaman, non-commissioned officer or private of marines, who shall have served on board any ship or vessel of his Majesty, his heirs or successors, or shall utter or publish as true any petition for a certificate, herein-before described or mentioned, to enable any person or persons to obtain letters of administration to any such petty officer or seaman, non-commissioned officer or private of marines, who shall have served on board any ship or vessel of his Majesty, his heirs or successors, or shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act and assist in the false making, forging or counterfeiting any certificate for enabling him, her or them to obtain probate, or letters of administration with the will annexed, or any check, remittance bill or duplicate of remittance bill, or any certificate to the deputy paymaster, in respect of wages, prize money, and other allowances of money, not exceeding ten pounds, herein-before severally described or mentioned, in order to receive any wages, pay or other allowances of money, or prize money, due or supposed to be due, for or on account of the service of any petty officer or seaman, non-commissioned officer or private of marines, on board any ship or vessel of his Majesty, his heirs or successors, or shall utter or publish as true, any check, remittance bill or duplicate of remittance bill, or certificate, to the deputy paymaster, in respect of wages, prize money, and other allowances of money, not exceeding ten pounds, herein-before severally described or mentioned, in order to receive any wages, pay or other allowances of money, or prize

money, due or supposed to be due for or on account of the service of any petty officer or seaman, non-commissioned officer or private of marines, on board any ship or vessel of his Majesty, his heirs or successors, knowing the same to be false, forged or counterfeited; then every such person, being lawfully convicted of any such offence or offences, according to the due course of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

XXX. And be it further enacted by the authority aforesaid, That, from and after the first day of August one thousand seven hundred and ninety-two, if any petty officer or seaman, non-commissioned officer of marines or marine, shall receive his pay, or shall attempt to receive the same or any part thereof, upon any certificate, purporting to be a certificate of servitude or a certificate of discharge, knowing the same to be forged or counterfeited, or if any such petty officer by himself, or by employing others, shall assist in the forging or counterfeiting of any such certificate, every such petty officer or seaman, non-commissioned officer of marines or marine, being thereof convicted, shall be punished as in cases of perjury.

Petty officers, seamen, &c. attempting to receive their pay on forged certificates, or assisting in forging them, to be punished as in cases of perjury.

XXXI. And be it further enacted by the authority aforesaid, That from and after the said first day of August one thousand seven hundred and ninety-two, no ecclesiastical court, proctor or proctors in such courts, nor any person or persons whatsoever, under any pretence, shall take and receive any more than the sum of fifteen shillings and two pence, for the seal, parchment, writing and suing forth the probate of any will, granted to the executors of any warrant, or any petty officer, seaman, non-commissioned officer of marines or marine, for the purpose of receiving wages or pay, or allowances of money of any kind which shall remain due to such warrant or petty officer, or seaman, non-commissioned officer of marines or marine, at the time of his or their death, for his or their services in his Majesty's navy, and for the pains, trouble, and expence attending the suing forth such probate, nor more than the sum of one pound four shillings and two pence for letters of administration, granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the

Sums to be paid for probates of wills, or letters of administration granted to executors or next of kin, &c.



goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds, nor more than the sum of one pound eight shillings and eight pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine; nor more than the sum of one pound seventeen shillings and eight pence for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of forty pounds; nor more than the sum of one pound eleven shillings and two pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine; nor more than the sum of two pounds eight shillings and six pence for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of sixty pounds; nor more than the sum of one pound thirteen shillings and eight pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine; nor more than the sum of two pounds eleven shillings for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the sum of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear the executors or administrators of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, no ecclesiastical court, proctor or proctors in such court, nor any person or persons whatsoever, under any pretence, shall take or receive more than the sum of fifteen shillings for the seal, parchment, writing and suing forth of any such commission or requisition, and

for the pains, trouble and expence attending the same, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds; nor more than the sum of one pound three shillings, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds.

XXXII. Provided always, That no ecclesiastical court, proctor or proctors in such court, nor any person or persons whatsoever, under any pretence, shall take and receive any more than the sum of six shillings for the seal, parchment, writing, and suing forth the probate of any will granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother, or sister of any such warrant or petty officer or seaman, non-commissioned officer of marines, or marine, for the purpose of receiving wages or pay, or allowances of money of any kind, which shall remain due to such warrant or petty officer, or seaman, non-commissioned officer of marines, or marine, at the time of his or their death, for his or their services in his Majesty's navy, and for the pains, trouble, and expence attending the suing forth such probate; nor more than the sum of fourteen shillings for the letters of administration granted to the widow, children, father, mother, brother, or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds; nor more than the sum of nineteen shillings and sixpence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, such executor being the widow, children, father, mother, brother, or sister as aforesaid; nor more than the sum of one pound seven shillings and sixpence, for any such letters of administration granted to the widow, children, father, mother, brother, or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines or ma-

Sums to be paid for probates of wills or letters of administration, granted to widows, children, &c.

rine, unless the goods and chattels of such warrant or petty officer; seaman, non-commissioned officer of marines or marine, do amount to the value of forty pounds; nor more than the sum of one pound three shillings for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother, or sister as aforesaid; nor more than the sum of one pound eleven shillings for any such letters of administration granted to the widow, children, father, mother, brother or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of sixty pounds; nor more than the sum of one pound seven shillings and sixpence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother or sister as aforesaid; nor more than the sum of one pound fifteen shillings and sixpence for any such letters of administration granted to the widow, children, father, mother, brother or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear executors or administrators, being the widow, children, father, mother, brother or sister of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, no ecclesiastical court, proctor or proctors in such court, or any person or persons whatsoever, under any pretence, shall take or receive more than the sum of twelve shillings for the seal, parchment, writing, and suing forth of any such commission or requisition, and for the pains, trouble, and expence attending the same, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds; nor more than the

sum of fifteen shillings and sixpence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine do amount to the value of forty pounds; nor more than the sum of sixteen shillings and sixpence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of sixty pounds; nor more than the sum of eighteen shillings and sixpence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds.

XXXIII. And be it hereby further enacted, That, from and after the said first day of *August*, one thousand seven hundred and ninety-two, no ecclesiastical court, nor any person or persons whatsoever, save as herein-before mentioned, under any pretence, shall take and receive more than the sum of five shillings for the seal, parchment, writing, and suing forth of the probate of any will, or any letters of administration granted to the widow, children, father, mother, brother or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines or marine, and for the pains, trouble, and expense attending the suing forth such probate or letters of administration, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear the widow, children, father, mother, brother or sister, being executors or administrators of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, no ecclesiastical court, nor any person or persons whatsoever, save as herein-before mentioned, under any pretence, shall take or receive more than the sum of five shillings for the seal, parchment, writing, and suing forth of any such commission or requisition, and for the pains, trouble and expense attending the same, unless the goods and chattels of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of one hundred pounds.

No more than the sums here-in specified (except as before-mentioned) to be paid for probates of wills or letters of administration granted to widows, &c. for estates under 100l.

Bill of expenses on letters of administration granted to creditors, to be laid before the registers of the prerogative court, to be taxed, &c.

**XXXIV.** And be it further enacted and declared, by the authority aforesaid, That, in all cases where it shall be necessary to grant letters of administration, or letters of administration with will annexed, to any creditor or creditors of such petty officer, seaman, non-commissioned officer of marines or marine, the proctor or proctors suing forth, or causing the same to be sued forth, shall make out a bill of costs, which he or they may have actually paid for stamps, or fees in the ecclesiastical court, or otherwise or elsewhere, and which bill of expenses shall also contain an account of charges for his or their pains and trouble in every thing attending or relating to the suing out, or causing to be sued out, such letters of administration, or letters of administration with will annexed; which bill of expenses and charges the said proctor or proctors shall lay before the registers of the prerogative court of *Canterbury*, or certain deputies authorised to act for them, to be examined and taxed, and the said registers and deputy registers are hereby authorised to examine and tax the same; and which bill of costs and charges, after having been so examined and taxed by the said registers of the prerogative court of *Canterbury*, or by their deputies, or by any one of the said registers, or by any one of the said deputies; they shall certify the same, or that part of the same which remains after being so taxed, to be fair and equitable charges, according to the usual fees allowed, and customary charges made by proctors in *Doctors' Commons*, and then shall return the said letters of administration, or letters of administration with will annexed, and the said bill of expenses and charges, to the proctor or proctors who shall have so laid the same before them, and which bill of costs and charges shall be allowed to contain a fee of three shillings and fourpence to be paid to the said registers, or to the said deputy registers, who shall have so taxed and examined the same; and when the said proctor or proctors have finally obtained such letters of administration, or letters of administration with will annexed, granted to the creditors of such petty officer or seaman, non-commissioned officer of marines or marine, and such bill of expenses and charges, certified as herein directed, he or they shall forward such letters of ad-

Fee to register for taxing.

Proctors to forward letters of

ministration, and letters of administration with will annexed, and certificates of expenses and charges, to the treasurer, or to the paymaster of his Majesty's navy; and if any officer or officers, proctor or proctors, or any other person or persons, shall presume to take any more than the several sums herein-before allowed and directed to be taken in the different events specified, for the charges of probates, letters of administration, commissions and requisitions, in the manner herein particularly mentioned and expressed, the person or persons so offending shall forfeit to the party aggrieved the sum of fifty pounds, to be recovered with full costs of suit, by action of debt, bill, plaint or information, in any of his Majesty's courts of record at *Westminster*, or elsewhere; or if any register or other officer of any ecclesiastical court, shall knowingly and wilfully be aiding or assisting in procuring probate of the will or letters of administration, for the purpose of enabling any person or persons to receive the wages, pay, prize money, or allowance of money of any kind due, or becoming due for the services of any petty officer, seaman, non-commissioned officer of marines or marine, on board any ship or ships, then or formerly belonging to his Majesty or his predecessors, or heirs and successors, otherwise than in the manner prescribed by this act and the other act herein-before mentioned, passed in the twenty-sixth year of the reign of his present Majesty, every such proctor, register, or other officer, shall for ever after be incapable of acting as proctor, register, or in any other capacity, in any ecclesiastical court in *Great Britain*, and shall for every such offence forfeit and pay the sum of five hundred pounds, to be sued for, recovered and levied by action of debt, bill, plaint or information in any of his Majesty's courts of record at *Westminster*, and one half of every such penalty or forfeiture shall be and belong to his Majesty, his heirs and successors, and one half to him or them who shall discover, inform, or sue for the same.

administration and certificate of expenses to the treasurer or paymaster of the navy.

Penalty on proctors, &c. taking more than the prescribed sums for probates, &c. and on officers of the ecclesiastical court, procuring probates, &c. contrary to this act, or 26 Geo. 3. c. 63.

XXXV. Provided always, and be it further enacted by the authority aforesaid, That whenever any extraordinary pains, trouble or expense has attended the suing out letters of administration, or letters of administration with will annexed, to the widows or next of kin, or probates of wills

The treasurer or paymaster may allow a reasonable charge for extraordinary expenses, &c.

to the Executors of any such petty officers or seamen, non-commissioned officers of marines or marine, the proctor or proctors who have sued out the same may, in consideration thereof, make an addition, in proportion to the said extraordinary pains, trouble and expense to his or their bill of charges and expenses, and which appearing reasonable, the Inspector shall allow and pass the same; but if the same shall appear unreasonable or exorbitant to the treasurer or paymaster of the navy, in that case the said bill of charges and expenses shall be returned to *Doctors' Commons*, to be checked and taxed as aforesaid, by the registers or any one of them, or by the deputy registers or any one of them, who are hereby directed so to do without fee or reward, unless the said charges and expenses shall have arisen in consequence of any litigation or suit respecting the obtaining or suing out such letters of administration, letters of administration with will annexed, or probate of will, in which cases the said registers or deputy registers shall be permitted to charge and take the aforesaid fee of three shillings and fourpence.

So much of  
26 Geo. 3.  
c. 63. as is  
not hereby  
repealed,  
to continue  
in force.

XXXVI. Provided always, and it is hereby expressly declared, That so much of the said act passed in the twenty-sixth year of the reign of his present Majesty, as is not repealed by this act, shall remain in full force and effect.

39 & 40 Geo. 3. c. 98.

*An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the Time therein limited.*

[28th July, 1800.]

Preamble.

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoy-

ment thereof is postponed, should be made subject to the restrictions hereinafter contained: may it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in parliament assembled, and by the authority of the same, that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living; or in ventre sa mere at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

No person by deed or will, &c. shall settle or dispose of any real or personal property, in such manner that the rents or produce shall be accumulated for a longer term than herein mentioned, and any other direction shall be void, and the rents go to the persons entitled thereto.

II. Provided always, and be it enacted, That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settler or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions

Nothing herein to extend to any provision for payment of debts or for raising portions for children, or touching the produce of timber:



shall and may be made and given as if this act had not passed.

Nor to any disposition of heritable property in Scotland.

III. Provided also, and be it enacted, That nothing in this act contained shall extend to any disposition respecting heritable property within that part of *Great Britain* called *Scotland*.

When restrictions shall take effect with respect to wills made before the passing of this act.

IV. Provided also, and be it enacted, That the restrictions in this act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this act, in such cases only where the deviser or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this act.

## II. PRECEDENTS OF WILLS

AND

### TESTAMENTARY DISPOSITIONS.

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#### No. I.

*A convenient form of a Will, containing dispositions of real and personal Property, the whole to form one Fund, and go as personal Estate (1).*

**T**HIS is the last will and testament of me, Samuel H. of &c. I give and devise unto A. B., C. D. and E. F., their heirs and assigns, all my freehold and copyhold messuages, lands, tenements, and hereditaments, whereof I have power

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(1) Instead of settling freehold estates as land, (a mode which, where there are several persons and their families to be provided for who are equally the objects of the testator's care, is inconvenient, as well from the difficulty in the way of a specific division by metes and bounds, as from the embarrassment and expense which often arise from creating numerous undivided shares in tail) it is advisable to vest the lands in trustees, to be sold with the consent of those beneficially interested, with directions to place out the produce of such sale, after discharging debts and legacies, in the funds or on real securities, to pay the interest in certain proportions to the persons who are to have life interests, and after their deaths to pay

Of the advantage of treating all the property as personal.

**No. 1.** to dispose, with their and every of their rights, members, and appurtenances, in possession, reversion, remainder or expectancy, to hold the same unto and to the use of them the said, &c. their heirs and assigns for ever, upon trust, that they, the said (trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor (2), do and shall, as soon as conveniently may be after my death, sell and absolutely dispose of the same, together or in parcels, by public auction or private contract, as to them or him shall seem expedient, for the best price or prices, in money, that can be reasonably had or obtained for the same respectively, and respectively to convey and surrender the same accordingly. And I will and declare, that the receipt or receipts of the said (trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor, for the money for which the same shall be so respectively sold, shall from time to time be a sufficient discharge (3), or sufficient

Real estate to trustees and their heirs to sell and convert the same into money.

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over the principal in equal shares among the children, with such other provisions as are exemplified in this will; and no sale need be made till the convenience of the parties calls for it, or a proper occasion offers itself.

(2) If lands are devised to be sold and nobody appointed to sell, it is the province of the executors, and a court of equity will compel all proper parties to join in the sale, 1 Atk. 490. The word 'dispose' does not of itself import a direction to sell, but to manage the estate, 3 Atk. 287.

Of the clause for discharging purchasers, and their liability, in the absence of such clause, to look to the application of the purchase-money.

(3) This clause ought never to be omitted, for though where it is not inserted, the purchasers from the trustees are justified at law in paying their money to the trustees; yet, in equity, they are, in certain cases, considered as responsible for the application of the money according to the trusts. They have been held liable in most cases, where there is a specification of the debts to be paid with the produce of the sale, but not where the trust is to pay debts generally, even though they have notice of the debts; nor are the purchasers bound where the trust is to pay debts generally, and also legacies, for though these last are specified objects, yet they are coupled with others which are unascertained, and they shall not involve the purchaser in the account of the debts: neither is

discharges, to the purchaser or purchasers of the said several premises herein-before made saleable by this my will, or any part or parts thereof, for his, her, or their purchase money, or so much thereof as shall be therein acknowledged or expressed to have been received; and that such purchaser or purchasers, his or their heirs, executors, administrators

No. 1.

the purchaser bound to see to the application of the purchase money, where the debts are *charged* generally upon the estate, though the contrary seems formerly to have been held, 6 Vez. Jun. 654, n. But where lands are charged with the payment of *annuities*, they are liable in the hands of purchasers; for the object of making the lands a fund for the payment in this case, was that there should be a constant and subsisting fund, Barnard, 82. 5 Vez. Jun. 130, Wynn v. Williams. These appear to be the most important distinctions.

A few further remarks on ~~the~~ trusts for sale may not be without use to the student. He will observe that the power of sale is generally given to the same persons as are named executors; and where that is the case and the subject is leasehold, there is no doubt but that any one, or any part of the executors, may alien the legal estate without the concurrence of the rest of the number; and this, not by reason of their interest as trustees, because *as such* they are merely joint-tenants, and can only sever the jo and alien their respective undivided shares, but by reason of their office of executors; for the particular power might in such case be said to flow into and be lost in their authority as executors, or perhaps more properly to give place and precedence to that general power which executors possess, *ratione officii*, over all chattels.

Where trustees for sale are also made executors; and of the statute 21 Hen. 8.c.4.

Where the subject of the power was freehold some regard was also had at common law to their office of executor; and to some purposes, even the power of disposing of freehold seems to have been considered as vesting in them, *ratione officii*. For this reason, it seems that if a power to sell lands were given to two executors, and one died, this power was by the better opinion held to survive, and to be transmissible to the executors of the survivor. Whether part of the executors could sell the whole of such property without the rest, was a doubt at common law, as appears by some of the books, but particularly from the recital of the statute 21 H. 8. c. 4. which was made to put an end to these doubts.

**No. 1.** or assigns, or any of them, shall not afterwards be answerable or accountable for any loss, misapplication or misapplications of such purchase money so received, or any part or parts thereof. And my will further is, that the monies which shall arise by or from such sale or sales as aforesaid, shall be deemed to be part of my personal estate; and that the clear

That the monies arising by the sale shall be

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That statute, reciting that, *according to the opinion of divers persons*, where a testator had devised his lands to be sold by his executors, a bargain and sale would in no wise be effectual unless made by the whole number of the executors, for remedy thereof enacts "that all bargains and sales by those who accept the charge without the rest, shall be as good and effectual in law as if the rest had joined." This statute has always been construed largely and liberally as a very beneficial law; and thus though it expressly provides only for cases where the lands are willed to be sold by the executors, yet the settled construction has extended to cases where the will devises the lands to executors to be sold. Thus Lord Coke, in commenting on the 169th section of Littleton, p. 113, b. makes the following observations on this statute: "In Littleton's case admit that *one* executor had *refused to sell*, then as the law stood when Littleton wrote, it was clear that the others could not sell, but now by the statute it is provided that where lands are willed to be sold by executors, though part of them refuse, yet the rest may sell; and albeit the letter of the law extendeth only to where executors have a power to sell, yet, being a beneficial law, it is by construction extended to where lands are devised to executors to be sold." And the construction has been still further enlarged; for it has been held that where lands are devised to trustees to be sold, and the same persons to whom the lands are so devised, are in another part of the will made executors, the statute will extend to this case. Thus, in *Bonifaut v. Sir Richard Greenfield*, Cro. El. 80, the case was this: "a testator seised of the manor of D. devised the same to I. S. and three others, and their heirs, to the intent that the trustees should sell it for the best profit, and apply the money as therein mentioned; and in the conclusion of the will he made the same four persons his executors, and died. One of the four refused to meddle with the will or sale, and the other three sold the land in the life-time of the fourth, and whether the sale was good was the question.

yearly rents and profits of the said hereditaments and pre-  
 mises, in the mean time, until the same shall be sold, or of  
 so much thereof as shall be remaining unsold, shall be  
 deemed to be part of the annual income of my personal  
 estate; and that the same monies, and rents and profits, shall  
 be subject to the dispositions hereinafter made concerning

No. 1.

personal  
 estate, and,  
 until sold,  
 the rent  
 shall be  
 considered  
 as the in-  
 come of the  
 personal  
 estate, and

The case was argued by Popham and Egerton, and it was adjudged that the sale was good by the three executors, either by the common law, or by the statute 21 H. 8. c. 4.; for when he devises the land to four to sell, and afterwards makes them his executors, this doth tantamount as if at the first he had devised that such his executors should sell; and in such a case at the common law, the sale by three, the fourth refusing, was good; for these three may perform the will without the fourth, but the statute makes it clear." See the remark of Lord Kenyon on this statute, viz. that the law before the statute, was considered as doubtful, and that the statute was made rather to remove doubts than to make a new law. 6 T. R. 396.

It is proper however to add, that though such a sale by one or some of the trustees and executors, the rest refusing, should seem to be good and valid to carry the whole legal estate and interest, yet where the receipts of the trustees are, by the deed, made discharges to the purchaser, there may be doubts whether he would be safe in paying his purchase money without a receipt and acknowledgment in which all are joined. X

It is a general rule, that where property is devised to be sold by the trustees for particular purposes, as for payment of debts and legacies, nothing more is subject than those purposes require, and the personal estate must first be applied. There is, in these cases, therefore, always a resulting trust of the residue, after the purposes are answered: the real results to the real, and the personal to the personal representative; and if the personal is sufficient to answer all the purposes, the whole real estate results and descends to the heir, or goes to the residuary devisee. And by the way it may be here noticed, that this residue is not like the residue that arises by lapse, in respect to which there is a difference between real and personal estate, as has before been observed.

Of the con-  
 version of  
 real into  
 personal  
 estate, in  
 equity,  
 when par-  
 tial and  
 when total.

But sometimes by the effect of the dispositions of the will, as where there are ulterior general purposes to be answered by the

No. 1: my personal estate, and the annual income thereof, respectively. And as touching my personal estate remaining after payment of my debts, funeral and testamentary charges, and the legacies hereinafter bequeathed, I give the same to the said trustees, their executors, administrators and assigns, upon the trusts, and for the intents and purposes, and under

that the said monies, rents, &c. shall be subject to the dispositions after mentioned

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sale, which require the estate to be converted, as is the case in the will to which this note is attached, the real estate by the direction to sell is made personal estate *out and out* as it is usually expressed. And then there is no resultancy for the heir at law, but the character of personalty is impressed upon it to all intents and purposes; and if there is a residue it goes with the residuary bequest, or if there is no disposition of the residue, the mere appointment of an executor is sufficient to carry it to him, either for his own benefit, or as trustee for the next of kin; which question, between the executor and next of kin, has been discussed in a preceding chapter under its proper title; see 2 Bro. C. C. 589, and 1 Vez. Jun. 44, *Robinson v. Taylor*, and see 11 Vez. Jun. 87, *Berry v. Usher*. The truth is, when the estate is only devised to be sold to pay debts and legacies, it is considered as in the nature of a charge only, 3 Vez. Jun. 210, *Haldemand v. Hudson*.

Of the rule in respect to trustees becoming purchasers

A trustee for sale, as long as he retains that character, is never permitted to purchase for his own benefit. And though in a particular case there may be the most satisfactory evidence that the transaction amounts to no more than what the general interests of justice and of the parties would warrant; yet, as the powers of the court would not be equal to protect against deception, from the impossibility of knowing the truth in every case, the rule of exclusion must of necessity be universal. The ground of the rule is, that the situation of the trustee gives him the opportunity of knowing the value of the estate he is to buy, better than the *cestui que trust*, and therefore they do not deal on equal terms; besides which, he is by his trust bound to apply his knowledge for the benefit of his *cestui que trust*; and therefore he cannot be permitted to make a bargain adversely with the party whose interest he is in conscience obliged to promote. But the trustee may shake off the character of a trustee by a previous agreement with his *cestui que trust*, if of age and capable of discharging him, (though it may be difficult to determine when that has been done effectually) and

and subject to the powers, provisoes, declarations and agreements hereinafter expressed and declared, of and concerning the same, that is to say, upon trust that they, the said (trustees), or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, or on real securities in England, at interest, and do and shall vary, alter or trans-  
 pose (4) such stocks, funds or securities for others of the like nature, when and so often as it shall seem expedient; and do and shall pay the interest and dividends of the said stocks, funds and securities, unto such person or persons only, and for such intents and purposes only, as my daughter, E. H. by any writing or writings under her hand, from time to time, shall direct or appoint, notwithstanding any cover-  
 ture she may be under; and in default of such direction or appointment, and in the mean time until she shall make any such direction or appointment, do and shall pay the same, or so much whereof she shall or may from time to time happen to make no such appointment, into the proper hands of my said daughter, exclusively (5) of any husband she may happen to marry, who is not to intermeddle therewith, nor is the same or any part thereof to be subject or liable to such husband's controul, debts, or engagements.

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as to the personal property.

And as to his personal estate remaining after payment of debts and legacies, and funeral and testamentary charges.

To the trustees upon trust to invest the same in the public funds.

With power to vary the securities.

To pay the dividends to the testator's daughter for life, for her separate use.

put himself in circumstances in which he will no longer be the person intrusted to sell, and then, it seems, he will be permitted to purchase; see the cases *ex parte Bennett*, 10 Vez. Jun. 381. and *Sanderson v. Walker*, 13 Vez. Jun. 601.

(5) If a trustee of stock take upon him to transfer at all without such a power he is guilty of a breach of trust, and the cestui que trust is intitled in equity to his election, either to have the individual stock restored to him, or to have the money it produced; 2 Atk. 121, *Harrison v. Harrison*, 2 Bro. C. C. 653, *Bostock v. Blakeney*, 1 Vez. Jun. 297, *Powlet v. Herbert*, 4 Vez. Jun. 497, *Long v. Stewart*, 5 Vez. Jun. 800, (n).

Of the propriety of giving the power of varying the securities.

(6) Where no trustee happens to be appointed for the wife to whose separate use property is devised, the husband becomes a trustee for the wife; 2 P. Wms. 316.

Where no trustee appointed.



**No. 1.** And I will and declare, that the receipts of my said daughter, or of such person or persons as she shall, or may, from time to time, direct or appoint to receive such dividends or interest, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same, or so much thereof, as in such receipts shall be expressed to be received; and from, and immediately after the decease of my said daughter, upon trust, that they, the said trustees or trustec, for the time being, do and shall pay, or transfer, all such principal monies, stocks, funds, and securities, unto all and every the child, or children, of the body of my said daughter, lawfully to be begotten, equally to be divided between, or among them, share and share alike, if there shall be more than one; and if there shall be but one such child, the whole to be paid or transferred to such one child; the share or shares of such of them, as shall be a daughter, or daughters, to become vested in her or them respectively, on her or their attaining her or their age, or respective ages of 21 years, or on the day, or respective days, of her or their marriage, which shall first happen; and the share or shares of such of them, as shall be a son, or sons, to become vested in him or them respectively, on his or their attaining his or their age, or respective ages, of 21 years, and to be paid or transferred at such age or ages, time or times, as aforesaid, to such of the said daughters or sons, as shall arrive at, or attain, the same, after the decease of my said daughter; but as to such of them as shall arrive at, or attain such age or ages, time or times, as aforesaid, in the life-time of my said daughter, the payment or transfer of his, her, or their share or shares, to be postponed till after her decease: provided, and I do hereby declare my will to be, that if any such child, or children, being a son or sons, shall depart this life before he or they shall attain his or their respective ages of 21 years, or being a daughter, or daughters, shall happen to die before she or they shall attain her or their age, or respective ages of 21 years, or be married, then the share or shares of him, her, or them so dying, shall go and accrue to the survivors or survivor, or others or other, of such children, and be equally divided amongst them, if more than one, share and share alike; and the same shall become vested and pay-

And after the daughter's decease to transfer the principal to and among her children in equal shares.

The respective shares to become vested at 21, or marriage.

With accruer by survivorship.

able, or transferable, at such ages, days, and times, as his, No. 1.  
 her, and their original portion and portions are hereby directed to become vested and payable, or transferable, as aforesaid; and in case of the death of any other of the said children of my said daughter, before such accruing or surviving share, or shares, shall become vested as aforesaid, then every such accruing or surviving part, or share, shall again be subject, and liable to such right, chance, contingency, or condition, or accruer to, and amongst the survivors or survivor (7), and others, or other, of the said children, as herein-before is provided, touching the said original portion, or portions; and upon further trust, that the said trustees, or trustee, for the time being, do and shall, after the decease of my said daughter, pay and apply the dividends or interest of the share, or shares, of such of the said children as shall not have acquired a vested interest in the portion, or portions, herein-before provided, or intended for him, her, or them, respectively, for, and towards, his, her, or their maintenance and education, respectively, until the same respectively shall become payable. Provided, that if there shall be no child of the body of my said daughter, lawfully begotten, or there being one or more such child or children, and such of them as shall be a son or sons, shall happen to die before he or they shall attain the age of 21 years, and such of them as shall be a daughter, or daughters, shall happen to die before she or they shall attain her or their age, or respective ages of 21 years, or be married, then, and in such case, it is my will, that they, the said trustees, or trustee, for the time being, shall pay or empower ———, to receive the dividends, or interests thereof, during her life, and from and immediately after her decease, do, and shall raise the sum

Provision  
for main-  
tenance.

In case of  
there being  
no child to  
take the  
benefit of  
the before-  
mentioned  
trust, then  
to pay the  
testator's  
mother the  
dividends.

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(7) A. gives 1000*l.* among four persons, as tenants in common, and directs, that if one of them dies before 21, or marriage, it shall survive to the other; if one dies, and three are living, the share of that one so dying, will survive to the other three; but if a second dies, nothing will survive but his original share, for the accruing share is a new legacy, 3 Atk. 80. 2 Ch. Rep. 131. 1 P. Wms. 275. Ca. temp. Talb. 124, 1 Bro. C. C. 575. The will, therefore, must specially provide for this.

Of the  
clause  
making the  
accruing  
shares sub-  
ject to sur-  
vivorship.

No. 1.

And after  
her de-  
cease to  
raise the  
sum of —  
for —  
and to di-  
vide the  
surplus  
among  
— and —

Proviso, in  
case of the  
daughter's  
being a  
minor at  
testator's  
death, for  
applying  
the divi-  
dends for  
her main-  
tenance  
until her  
coming of  
age.

of — of lawful money of Great Britain, and pay the same to my nephew D., his executors, or administrators, and do, and shall pay; or transfer, one third part of the surplus thereof, to —, her executors, or administrators, one other third part to —, her executors, or administrators, and the remaining third part thereof, to —, her executors, or administrators; provided, that in case my said daughter shall be in her minority, and unmarried at the time of my decease, the said trustees, or trustee, for the time being, shall apply the dividends, or interest of such principal monies, stocks, funds, or securities, as aforesaid, for, or towards her maintenance and education, until she shall attain her age of 21, or shall be married; provided further, that it shall be lawful for my said trustees, or trustee, for the time being, in case my said daughter shall marry, (so as such marriage, if she shall be under the age of 21 years, shall be had with the consent (8) of her guardians or guardian,) to

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(8) A point has been made, whether notice to the party was necessary or not; and it has been decided to be not necessary. *Williams v. Fry*, 1 Mod. 86. In adverting to *Frances's* case, 8 Rep. 92. where it was ruled, that the party ought to have notice, the chief justice observed, that in that case, the party to be excluded, was the heir at law, but not so in the case before him, p. 88. In the case above-mentioned, evidence was produced to shew, that the trustees gave consent after the marriage; but Lord Vaughan observed, that the post consent was nothing, for consent cannot be had of things which cannot be otherwise; a man cannot be said to consent to his stature, or the colour of his hair. 1 Mod. 312. But as to this point, respecting the operation of post consent, there may, perhaps, be a difference between a restriction upon marriage without consent, and against consent. See *Fleming v. Waldegrave*, 1 Ch. Rep. 58. cited 2 Vern. 573. It is the doctrine of the ecclesiastical courts, and of the civil law, that matrimony should be free, and courts of equity lean towards the same doctrine, making a distinction, however, between conditions absolute, and conditions followed by a devise over, to which Lord Hale gave the appellation of conditional limitations. Thus, where a testator devised 3000*l.* to his daughter, at 21, or marriage, provided she married with the consent of B. and if she married without such consent, then she was

raise, by and out of the said principal money, stocks, funds, or securities, the sum of —l. of lawful money of Great Britain, and to pay the same upon, or immediately after, such marriage, to such person or persons, and for such purposes, as my said daughter, by any writing, or writings, under her hand, attested by two or more credible witnesses, shall di-

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to have only 500*l.* and the 3000*l.* legacy was to cease. The daughter married without consent, yet the whole 3000*l.* legacy was adjudged to her, because it was not devised over, but only to fall into the surplus, *Garret et Ux. v. Pritty*, 2 Vern. 293. And this case was cited and confirmed, 1 Atk. 375. But where there was the devise of a legacy to a daughter, but if she married without her mother's consent, then 500*l.* of the daughter's legacy was to go to the son, there, upon the daughter's marrying without the mother's consent, it was decreed that the son should have the 500*l.* for it was said by the court that it was not to be taken as a clause in terrorem only, but that the 500*l.* devised over was well devised over, being an interest vested in the ulterior devisee, 2 Vern. 357. *Stratton, v. Grymes*; 3 Atk. 367. In a subsequent case, where a portion was given to a daughter, with a like restriction, if she married without consent, without any limitation as to time, followed by a disposition of the portion to another person, upon breach of the condition, the court held, that the marriage, without consent, was such breach of the condition, and that though a condition subsequent, the court could not relieve against the forfeiture, by reason of the devise over; although it was a hard condition, no time being limited, and extending to a marriage even after the age of 21. *Aston v. Aston*, 2 Vern. 452. It has been held that a devise of the residue is equivalent to a devise over. *Ames and Harmer*, 1 Eq. Abridg. 112. *Wheeler, v. Bingham*, 3 Atk. 364. *Scott v. Tyler*, 2 Bro. C. C. 431.

In our own law a distinction has always been taken between the cases, wherein the condition has been precedent, and wherein it has been subsequent. And, generally, this seems also to have been the sense of the civil law. For where a legacy was given upon a precedent fact, which might, or might not happen, or directed to be paid at a certain time, which might or might not come, if the fact required did not happen, or the time required never came, by the civil law the legacy was lost. Dig. L. xxxvi. Tit. 2. l. 21, 22. L.

No. 1. rect; and I give the following legacies, that is to say, I give to my mother 300*l.*; to my three sisters 100*l.* a-piece; to my nephew, J. H——, 300*l.*; to my niece S—— 100*l.*; to Mrs. B—— and her daughter, 20*l.* a-piece, for a ring; to Mr. N—— 50*l.*; and to each of my executors, hereinafter appointed, 50*l.* And I appoint the said —— executors

Of conditions in restraint of matrimony.

xxxv. Tit. 1. l. 41. By Ulpian. But in respect to restraints upon matrimony, the civil law made no distinction between conditions precedent, and conditions subsequent, however it might admit such distinction in other cases. While in the decisions of our own courts, this distinction has been applied to matrimony, as well as to other cases. In the case of *Gillet, v. Wray*, 1 P. Wms. 284, one by will left to his grand-daughter, an annuity of 10*l.* and afterwards, by a codicil to his will, declared, "that if his grand-daughter should marry with the good-liking of his trustees, then she should have 150*l.* and her first annuity should cease." The grand-daughter afterwards married a man without the consent of the trustees, and Lord Cowper would not relieve against the condition. And it seems, from that case, that where the condition is in the affirmative, and introduced with the conjunction *if*, it is a condition precedent. But it may be seen from the case of *Taylor v. Bury*, 2 P. Wms. 625, that the Courts will gladly lay hold of circumstances, to avoid the construction of a condition precedent, in cases of restriction upon matrimony. In that case, one devised the residue of his personal estate to I. S. provided she married with the consent of his two executors. One of them died, and she married without the consent of the survivor. This was considered as a condition subsequent, and the grounds upon which it was so considered, were two: first, that it was the devise of the residuum, which, if the condition were held to be precedent, might not have vested till 20 or 30 years after the testator's death. 2nd. That the bequest was first to I. S., which, if the will had stopped there, would have been an absolute devise, and the condition annexed followed the devise. And thus considering it, the rule of law applied, viz. that if a condition subsequent becomes impossible, by the act of God, the grantee is excused from the condition. In this case it became impossible, inasmuch as the consent of both executors was required, and one was dead. These distinctions between conditions precedent and subsequent, were taken in the case of *Long v. Dennis*, 4 Burr. 2052: but all the court in that case

of this my last will and testament. Provided, and my will is, that if the said, &c. or any of them, or any of their heirs, executors, administrators, or assigns, or any trustees or trustee, to be appointed in the stead or place of any of them, as herein-after is mentioned, shall die, or be desirous of being discharged from, or refuse, or decline to act, or become in-

No.-1.

Proviso  
for changing trustees  
and for  
their indemnity.

agreed, that all conditions in restraint of marriage, are to find no favour in any court of justice. There the condition was, that "in case I. S. should marry with any woman, not having a competent marriage portion, or without the consent and approbation of the trustees, to be expressed in writing," then the estate was to go over. Lord Mansfield said the construction must be to vest the estate, in case I. S. married a woman of competent fortune, or had the consent and approbation of his trustees to marry a woman without one; and I. S. having married a woman with a competent portion, though without the consent of the trustees, it was adjudged, that a compliance with either part of the alternative, was a performance of the condition. It may be worthy of remark, that in this case, it was declared by the testator, that the condition should not be construed in *terrorem*, which express caution, the chief justice said, made it doubly in *terrorem*.

Where conditions of this sort respect interests in lands, such conditions shall prevail, and it will make no difference, whether it be precedent or subsequent, or whether there be or be not a devise over: which is a doctrine in conformity with the rule, that portions or legacies charged upon lands, do not vest until the period of payment arrives. And with respect to personal legacies, where the condition in restraint of marriage, is followed by a devise over, the rule is the same; but where, in the case of personalty, the condition be considered as subsequent, and there is no devise over, the courts will construe such a condition in *terrorem*; and it is said that the doctrine is grounded upon an inclination in the court of chancery, to conform to the maxims of the civil law, and ecclesiastical courts, in this respect. It is to be observed, however, that this conformity is not maintained throughout; since, whether there be a gift over or not, makes no difference in the decisions of the ecclesiastical court. But it may be doubted, whether it is quite correct to say, that the ecclesiastical court recognises no distinction between conditions precedent, and conditions subsequent, in respect to this question. The truth seems

**No. 1.** capable of acting in the trusts of this my will, before the same respectively shall have been fully executed, performed, or discharged, then, and in such case, and so often as the same shall happen, it shall and may be lawful, to and for the person, or persons, who, for the time being, shall be entitled to the dividends, or interest, of the residue of my personal

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to be, that where the title to the legacy is made to depend upon the marriage, with consent, although the ecclesiastical court, notwithstanding its favour towards matrimony, yields to the necessity of considering marriage as a proper condition precedent, so that in such case, until marriage, the legacy shall not vest; still it regards the matter of consent, which operates as a restraint upon the marriage, as no integral part of the condition, but rather as a circumstance and an appendage. But it does not appear, upon an attentive perusal of the great aggregation of cases, which bear upon this subject, that our law has followed the ecclesiastical court to this extent, but with more propriety, wherever the condition is clearly, and unavoidably, a condition precedent, it regards the necessity for the consent, whether required by settlement, or will, as an integral part of it. This seemed to be the firm opinion of Lord Chief Baron Comyns, in the great case of *Harvey v. Aston*, Comyns, 726. and also of the chancellor and judges in the case of *Scott v. Tyler*, 2 Brown, 431. in which the reader will find the legal reasons for so considering this point learnedly expounded, in the very elaborate argument of Mr. Hargrave. And see the case of *Creagh et Uxor v. Wilson*, 2 Vern. 572. which was relied upon by Chief Baron Comyns. It is to be lamented, however, that this part of the question has been left in some uncertainty, an uncertainty not at all removed by the note of Mr. Serjeant Williams to the case of *Harvey v. Aston*, in Lord Talbot's cases, which seems in some respects to be an incorrect view of the doctrine. Nor can his position be maintained, that in the case of land, whether the condition be precedent, or *subsequent*, the interest can never vest, until the condition be performed; for when we say that the condition is *subsequent*, we inclusively say that the interest is *vested*. Mr. Sanders's note to *Harvey v. Aston*, 1 Atk. 380, is more intelligent and correct, though we cannot accede to the opinion expressed in that note, that a condition, involving such constraint, and plainly precedent, is only allowed by courts of equity to be effectual,

estate, if such person or persons shall be of full age ; and if not, then for the guardians, or guardian, of such person, or persons, by any writing, or writings, under their, his, or her hands and seals, or hand and seal, to nominate, substitute, and appoint, any other person, or persons, to be a trustee, or trustees, in the stead or place of him, or them, so dying, No. 1.

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where it substitutes a less for a greater legacy. A distinction that supposes a principle of law, can never, without a great sacrifice of certainty and consistency, be made to vary with the varying circumstances of the cases.

We should not finish this note without adding, that wherever a trustee, invested with the power of restraint, withholds his consent without just cause, or on improper grounds, a court of equity will supply such consent. See *Peyton v. Bury*, 2 P. Wms. 628. And 1 Atk. 375. 2 Atk. 16. And more particularly where the executor appears to have an interest operating on his behaviour in this respect, *Long v. Dennis*, 4 Burr. 2052. If an absolute consent be given it is irrevocable. *Dashwood v. Bulkeley*, 10 Vez. 242. And if a conditional consent be given, and the condition be performed, such consent becomes absolute. But if a trustee consents to a marriage, on condition of a settlement being made, and such settlement is refused to be made, and the consent in consequence retracted, if the marriage afterwards takes place without a fresh consent, equity will not relieve against the forfeiture, where the condition is subsequent, and a devise over. *Ib.* If a portion be given in consideration that a daughter should never marry, such general restraint is clearly invalid, being repugnant to the very law of the creation. *Swinb.* 6th edit. 282. And as all conditions in restraint of marriage, are considered with some jealousy by the courts, a strict performance has sometimes been dispensed with: as where only the major part of the guardians have consented, 1 Atk. 375. or, where only a tacit or implied consent has been given, 2 Vern. 580. Where the condition has been general, it has been construed with a limitation to the period of minority, 2 P. Wms. 547. Where the consent has been once given, a second marriage has been held good, without consent, 3 Bro. C. C. 128. And even where the party has married once, between the will, and testator's death, the restriction has been adjudged not applicable to a second marriage, 3 Vez. Jun. 227. Where there was a proviso not to marry without the consent of certain persons first had in writing, and consent was




**No. 1.** or desiring to be discharged, or refusing, or declining to act, or becoming incapable of acting as aforesaid: and that when, and so often, as any new trustee, or trustees, shall be nominated, or appointed, as aforesaid, all the trust-estates, and premises, which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon with all convenient speed conveyed, assigned, and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates and premises respectively; and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, and premises, then in such new trustee only, upon the same trusts as are hereinbefore declared or expressed, of or concerning the same trust estates and premises respectively, the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse or decline to act, or be incapable of acting as aforesaid, or such of them as shall be then subsisting or capable of taking effect. And my further will is, that all and every such new trustee or trustees shall or may in all things act and assist in the management, carrying on, and executing of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustees or trustee of the same trust estates, and premises, if there shall be any such continuing trustees or trustee, and if not, then by himself or themselves respectively, as fully and

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given, but not in writing, it was said by Serjeant Ellis, in the case of *Foy et Ux. v. Pester*, 1 Mod. 306, in addressing the court to have been ruled good by them upon another occasion, and such ruling was recognised by Lord Chief Baron Hale, who observed, that there was great equity in it, because such restraint was only a provident circumstance for obliging the party to obtain consent by a more solemn communication, and to ascertain the fact of its having been granted; and therefore it was rather circumstance than substance.

effectually, and with all the same power and powers, authority and authorities, of consent, approbation, discretion, selling, conveying, calling in, laying out and investing, giving and signing receipts, indemnifications, and discharges, to purchasers and others, and all other powers and authorities whatsoever, as if he or they had been originally in and by this my will nominated a trustee, or the trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, or as the trustee or trustees named in this my will, his or their heirs, executors, administrators, or assigns, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done, under and by virtue of this my will, if then living and continuing to act in the trusts hereby reposed in him or them, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. And my will further is, that the several trustees hereby appointed or to be appointed in pursuance of this my will, or any of the heirs, executors, administrators, or assigns, of them, or any of them, shall not be charged or chargeable with any more of the said trust monies and premises, than they respectively shall actually receive, and that one of them shall not be answerable or accountable for the others or other of them, or for the acts, receipts, neglects, or defaults of the others or other of them, but each one for his own acts, receipts, neglects, or defaults only; nor shall they, either or any of them, be answerable or accountable for any banker, broker, or other person, with whom any of the said trust monies may be deposited for safe custody or otherwise, in the execution of the said trusts, nor for the insufficiency or deficiency of any stocks, funds, or securities, in or upon which any of the said trust monies may be invested, in pursuance of and in conformity to this my will, or for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they the said several trustees so appointed, or to be appointed, shall and may, by and out of the monies which shall come to their re-

**No. 2.**  spective hands, by virtue of the trusts aforesaid, retain to and reimburse himself and themselves, and allow to his and their co-trustee and co-trustees all costs, charges, and expenses which they or any of them may respectively sustain or expend, or be put unto, in or about the execution of the trusts aforesaid, or in any matter relating thereto. And, lastly, I do hereby revoke all former wills by me at any time heretofore made, and declare this only to be my last will and testament.

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**No. 2.**

*A Will disposing principally of real Property in Shares, among Children and Grandchildren. (1)*

THIS is the last will and testament of me J. C. of N. in the parish of S. in the county of Middlesex. I give and devise unto J. F. and W. A. and J. C. all my freehold mes-

Of devises  
to child-  
ren, and  
grand-  
children.

(1) Where there is an immediate devise to all the children or grandchildren, or children and grandchildren, by a general description, which vests the property in possession upon the death of the testator, and is, therefore, then distributable, none but those in existence at the time, and answering the description, can take; the fund is then disposed of, and distributed, and consequently the after-born children are excluded. But, if the vesting in possession be postponed, so that no distribution need take place at the death of the testator, then all who answer the description, not only at the death of the testator, but born afterwards, and before the fund is to vest in possession, shall take; the general description includes all; and until the period of distribution arrive, none are excluded, *Hughes v. Hughes*, 3 Bro. C. C. 434. *Barrington v. Tristram*, 6 Vez. Jun. 345. *Walker v. Shore*, 15 Vez. 122. *Crone v. Odell*, 1 Ball v. Beatty 483. This rule is the same in grants as in wills. In all

suages, lands, tenements, and hereditaments whatsoever, to hold unto them the said J. F. W. A. and J. C. and their heirs, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisos, limitations, and declarations hereinafter expressed, limited, and declared, of and concerning the same, that is to say, as to, for and concerning all that my freehold messuage or te-

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grants of estates in land there must be a person in existence to take at the time the estate vests by the grant ; therefore, in the case of a conveyance to one and his children and their heirs, if he has children at the time, the father and all his children take jointly in fee, but if he has no child the father alone takes ; an after born child cannot take because the gift was immediate. So if a *devise* be to a man and his children, if he has children at the time, the expressed intent of the testator can take effect, according to the rule of the common law ; but if A. *devise* his land to B. and his children, and B. hath not any issue at the time of the devise, he takes an estate tail ; for the intent, which is the guide in the construction of a will, is clear that the children are to have an estate ; and as immediate devisees they cannot take, because they are not in *rerum naturæ*, and by way of remainder they cannot take, for the devisor designed to give an immediate estate ; therefore, the word *children* shall in such a case operate as a word of limitation, as if the gift had been to B. and the issue of his body. Wild's case, 6 Rep. 16.

On these general principles the law is settled that where a gift by will is immediate, it must operate accordingly. But where a devise or gift is to one for life, remainder to the children, or where the distribution is postponed to a future time, then the children born during the life, or before the time appointed for distribution, become entitled. *Graves v. Boyle*, 1 Atk. 509. *Haughton v. Harrison*, 2 Atk. 329. *Atty General v. Crispen*, 1 Bro. C. C. 386. *Baldwin v. Carver*, Cowp. 309. *Andrews v. Partington*, 3 Bro. C. C. 401. *Pulsford v. Hunter*, 3. Bro. C. C. 416.

Under a bequest to children, grandchildren are not entitled, except from necessity, as, if the will would be otherwise inoperative : Or, where the testator has clearly shewn by other words that he does not use the word children in the proper sense, but according to a more extensive signification. *Radcliffe v. Buckley*, 10 Vez. Jun. 195. by the Master of the Rolls, Sir W. Grant. *Crone v. Odell*, 1 Ball v. Beatty, 449.

## No. 2.

Devise of  
testator's  
freehold  
messuages,  
&c. to trustees.

To keep  
the same  
in repair,  
and insured from  
fire.

Limitation  
creating a  
tenancy in  
common,  
in tail, with  
cross remainders.

nement in which I now reside, with the chaise-house, wood-house, stable, and garden thereunto belonging, and also all that my freehold messuage or tenement, being No. 5, in N. street aforesaid, with the garden behind the same, now in the tenure of ———, and also all that my freehold messuage or tenement, being No. 4, in N. street aforesaid, with the garden thereunto belonging, now in the tenure of ——— together with all the fixtures and appurtenances to the said messuage or tenement and premises, or any of them, belonging, to the use of the said trustees, their heirs, and assigns, during the natural life of my wife Sarah, upon trust from time to time, during the continuance of that estate, to cause the same premises to be kept in good substantial repair, and to be kept insured from loss or damage by fire, to the full value thereof, or as near thereto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance, may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the same premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trusts hereinbefore declared, upon trust to pay unto or empower my said wife to receive the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purpose aforesaid, to and for her own use and benefit; and from and immediately after the decease of my said wife, to the use of my four children, William, Henry, James, and Elizabeth, as tenants in common, and the several heirs of their respective bodies, and in case there shall be a failure of issue of any of such children, then as to the share or shares of him, her, or them, whose issue shall so fail, to the use of the others of them, as tenants in common, and the several heirs of their respective bodies, and in case there shall be a failure of issue of the bodies of all such children but one, then to the use of such one child, and the heirs of his or her body, and in default of such issue, to the use of my own right heirs for ever. And as to for and concerning all those my three freehold messuages or tenements, numbered 1, 2, 3, situate in N. street aforesaid, and now in the several occupations of ———, with the gardens and appurtenances thereunto respectively

belonging, to the use of the said trustees, their heirs, and assigns, during the natural life of my said son William, upon trust, to support and preserve the contingent remainders hereinafter limited, from being defeated or destroyed, and upon further trust from time to time, during the continuance of that estate to cause the said premises to be kept in good and substantial repair, and to be kept insured from loss or damage by fire, to the full value thereof, or as near thereunto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance, may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the said premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trusts hereinbefore declared, to pay the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purposes aforesaid, for the use and benefit of my said son William, during his natural life, and from and immediately after the decease of my said son William, to the use of all and every the child and children,—[Same clause as before for creating a tenancy in common in tail, with cross remainders]—and in default of such issue, to the use of my said sons Henry and James, and daughter Elizabeth, as tenants in common, and the several heirs of their respective bodies,—[Same clause as before, making a tenancy in common, in tail, with cross remainders]—and in default of such issue, to the use of my own right heirs for ever. And as to, for, and concerning all those my seven freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, and 7, situate in —, with the out-houses, gardens, and appurtenances thereunto respectively belonging, as the same are now in the several occupations of —, to the use of — and —, their heirs and assigns, during the natural life of my said son Henry, upon trust to support and preserve the contingent remainders hereinafter limited from being defeated or destroyed, and upon further trust from time to time (same clause for keeping premises in repair and insuring from fire, &c.) and subject and without prejudice to the trusts hereinbefore declared upon trusts to pay such rents, issues, and profits of the last mentioned premises, or so much

**No. 2.** thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said son Henry, for his personal support and maintenance, for which his receipts in writing, signed with his proper hand shall alone be a sufficient discharge. Provided, and my will is, that in case my said son Henry shall alien, or charge, or attempt to alien or charge such his beneficial interest, in such rents, issues, and profits, as aforesaid, or any part thereof, then and from thenceforth he shall cease to have any benefit thereout, and such rents, issues, and profits, as he my son Henry would otherwise have been entitled to, shall for the then residue of his life, go and be paid unto the person or persons who for the time being shall be intitled to the remainder or reversion of the same hereditaments and premises, expectant on the determination of the said estate so limited to the use of the said trustees, their heirs, and assigns, during the life of my said son Henry, as aforesaid; and from and immediately after the decease of my said son Henry, to the use of all and every the child and children of the body of my son Henry, lawfully to be begotten, as tenants in common—[as before with cross remainders]—and in default of such issue, to the use of my said sons William and James, and daughter Elizabeth, as tenants in common,—[as before]—and in default of such issue, to the use of my own right heirs for ever. And as to, for, and concerning all those my 8 freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, 7, 8, situated, &c. with the appurtenances thereto respectively belonging, and now or late in the several occupations of, &c. to the use of the said trustees, their heirs and assigns, during the natural life of my said daughter Elizabeth, upon trust to support and preserve, &c. and upon further trust (to keep premises in repair and insured from fire, as before) and subject, and without prejudice to the trusts hereinbefore declared upon trust to apply such rents, issues, and profits of the said premises, or so much thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said daughter, for her sole and separate use and benefit, exclusively of any husband with whom she may intermarry, and so as the same may not be subject or liable to the power, controul, debts, or engagements of any such husband, and her receipt alone to be a

Proviso  
against  
charging  
or incum-  
bering.

Clause giving the exclusive enjoyment to a married daughter.

sufficient discharge for the same, notwithstanding any cover-  
ture she may be under. And in case my said daughter shall  
at the time of my death be in her minority, and unmarried,  
then to apply the same for or towards her maintenance and  
education, or if my said wife shall be living, to pay the same  
over to her my said wife, in order that she may apply the  
same for that purpose, and from and immediately after the  
decease of my said daughter, to the use of all and every the  
child and children of the body of my said daughter, lawfully  
to be begotten, as tenants in common—[limitation to her  
children as before, remainder over on failure of issue to tes-  
tator's sons in the same manner as before]—provided always,  
and my will is that it shall and may be lawful to and for the  
said trustees, and the survivors and survivor of them, and  
the executors or administrators of such survivor, by inden-  
ture or indentures under their or his hands and seals, or  
hand and seal, respectively to demise or lease such part or  
parts of the said vacant ground as may not be built upon at  
my death, unto any person or persons who may be willing  
to build upon the same or any part or parts thereof, for any  
term or number of years not exceeding 61 years from the  
making thereof respectively, yet so as that no erection or  
building shall be erected, whereby the said street, called St.  
James's Street, shall be rendered of less width in any part  
than 30 feet; and to demise or lease all or any of the residue  
of the hereditaments hereinbefore devised, unto any person  
or persons, for any term or number of years not exceeding  
21 years from the time of the making thereof, so as on every  
such lease so to be made, whether for building or not, there  
be reserved and made payable the best and most improved  
yearly rent or rents that can be reasonably had or gotten for  
the hereditaments and premises thereby demised, to be inci-  
dent to and go along with the immediate remainder or re-  
version of the said premises, without taking any fine, pre-  
mium, or foregift, for the making or granting of any such lease  
or leases respectively, and so as that in every such lease  
there be contained a clause of re-entry for non-payment of  
the rent or rents thereby reserved, and so as that no lessee  
or lessees be by any such lease or leases authorised or em-  
powered to commit waste, or exempted from punishment for

Power to  
make  
building-  
leases and  
common  
leases.



**No. 2.** committing the same, and so as the lessee, or respective lessees to whom any such lease or leases shall be so made, shall and do execute a counter-part or counter-parts thereof respectively, and enter into a covenant for payment of the rent or rents so to be reserved. And as to, for, and concerning all those my freehold messuages or tenements, situated in ———, and all those my freehold messuages, situate in ———, and all other my hereditaments hereinbefore devised to the said (trustees) and their heirs, whereof no use is hereinbefore limited or declared, with their appurtenances, to the use of them, the said trustees, their heirs and assigns, for ever, but nevertheless upon the trusts hereinafter declared concerning the same: and I give and bequeath my leasehold messuage and tenement, situated behind the three last mentioned messuages, and also my leasehold messuages and tenement, situate in ———, with their respective appurtenances, unto the said trustees, their executors, administrators, and assigns, for all such terms or term of years, as I shall have therein at the time of my decease, but nevertheless upon the trusts hereinafter declared concerning the same. And as to, for, and concerning as well the freehold messuages, tenements, and hereditaments hereinbefore lastly mentioned, or referred to, as the said leasehold messuages, tenements, and premises, I will and declare that the trustees or trustee thereof respectively, for the time being, do and shall, so soon as conveniently may be after my decease, sell, and absolutely dispose of the same, together or in parts, by public auction or private contract, as to them or him shall seem expedient, for the best price or prices that can be reasonably procured for the same; and as to the money arising by and from such sale or sales, and also as to the clear yearly rents, issues, and profits, arising from the said freehold and leasehold premises so hereinbefore directed to be sold as aforesaid, in the mean time, until the same shall be sold, I will and declare that the same respectively shall be deemed to be part of my personal estate and go according to the dispositions thereof hereinafter contained; and I direct that the receipts of the said trustees, their heirs, executors, administrators, or assigns, for the money arising by any such sale or sales, shall be good discharges for the same, or so much

Direction to trustees to sell freehold and leasehold property and to convert all into personalty, to pay thereout funeral and testamentary charges, and premiums of insurance; to finish certain houses not completed, and to lay out the surplus in the

thereof as shall be therein expressed to be received ; and that the purchaser or purchasers of the same several hereditaments and premises, or any part thereof, his, her, or their heirs, administrators, or assigns shall not be answerable for any loss, misapplication, or non-application thereof. And as to all my goods, chattels, and personal estate, not by this my will specifically disposed of, I give the same unto the said trustees, upon trust, in the first place to pay thereout all my just debts, (including all such ground-rents and premiums of insurance as may be owing from me at the time of my death,) and my funeral and testamentary charges ; and in the next place, the pecuniary legacies given by this my will ; and after making all such payments, to lay out so much of the residue as may be necessary in finishing any messuages or other buildings which may happen to be building by me on the said vacant ground, at the time of my death ; and to lay out the surplus, if any, in the purchase of 3 per cent. consolidated bank annuities, in the names of them the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor ; and as to such bank annuities, I will and direct that they the said trustees or trustee thereof, for the time being, do and shall place out the dividends or interest arising thereupon, from time to time, until my said son James shall attain the age of 21 years, (or in case he shall die before that age, until the period shall arrive when he would, if living, have attained that age,) in the purchase of like annuities, so as to cause as great an accumulation of stock as may be ; and when and so soon as my said son James shall attain the said age, or the period shall arrive when he would, if living, have attained that age, then to transfer one fourth part of such bank annuities as shall have been so purchased as aforesaid, unto my said son William, his executors, or administrators ; one other fourth part unto my said son Henry, his executors, or administrators ; one other fourth part unto my said daughter Elizabeth, her executors, or administrators ; and the remaining fourth part unto my said son James, his executors, or administrators ; and I give and bequeath to my said wife all my household goods and furniture, plate, rings, watches, china, ornaments, linen, and wearing apparel, books on the subject of divinity, prints, and

No. 2.

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funds, to accumulate till the youngest son arrives at 21, and then to divide it among the children.

**No. 2.** such of my drawings as are in frames. And I do hereby will and declare that such stock in the public funds as may at my death be standing in the joint names of my said wife and myself shall be hers absolutely. I give and bequeath to my son Henry all my books, manuscripts, papers, and drawings, (except those given to my wife, and such books as contain matters relating to my business unfinished, and my books of account, and books relative to my estates, all which I direct shall be retained by my executors). I also give to my son Henry all my boxes, containing books and papers relative to measuring, with their contents, utensils, and implements used in my business. I will that my executors do pay out of my personal estate 200*l.* for the board and education of my nephew H. T. until he shall be fit to be put out apprentice, and then that they do pay the further sum of 200*l.* with him as an apprentice fee (2). I give to my son William 20*l.* to be laid out for him as my executors hereafter named shall think proper. I forgive my son-in-law W. T. the debt of 100*l.* which he owes to me, and direct my executors to deliver up to him the bond whereby the same is secured to me, to be cancelled (3). I do hereby nominate, constitute, and appoint the said J. A. W. A. and J. C. executors of this my last will and testament; and I give to them the sum of 50*l.* each, as some compensation for their care and trouble in the execution of the trusts hereby in them reposed, and direct

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(2) If a legacy be given for the benefit of an infant in one way, and it cannot be applied in that way, it may be applied for his benefit in another way, as if it be to put him into orders, and he becomes a lunatic;—and where a legacy is given as an apprentice fee, if the boy is not put out apprentice, he will be entitled to this legacy when he comes of age. 5 *Vez. Jun.* 461. *Barton v. Cooke.*

(3) If W. T. should die in the testator's life-time this legacy will not lapse. 1 *Vez. Jun.* 49, 1 *P. Wms.* 83. But it is to be observed, that such a legacy will not prevail in equity against creditors; it is good, however, against executors, and if an action be brought for it by executors the court will grant an injunction. 3 *Atk.* 581. 1 *P. Wms.* 86. (n. 2.)

the same to be paid to, or retained by them, as soon as conveniently may be after my decease. I give and bequeath to my brother and to my two sisters and to my wife's son — the sum of 20*l.* each, to be paid to them respectively, as soon as conveniently may be after my decease. And I appoint my said wife guardian of such of my children as shall be under the age of 21 years at my decease; and after her decease I appoint my said trustees and the survivors or survivor of them the guardians or guardian of such of my children as may be then minors until they respectively shall arrive at the age of 21 years, and I do direct—[clause indemnifying the trustees, &c.]

In witness, &c.

No. 3.


Appoints  
his wife  
guardian.

### No. 3.

#### *A will disposing of real and personal Estate by way of Provision for Children.*

THIS is the last will and testament of me, S. K. of —, &c. I desire to be buried in the vault which I have lately made in the parish church of —, in the said county, and I earnestly request that my wife and son and all those who for the time being shall be entitled to the rents and profits of my messuages, lands, tenements, and hereditaments hereinafter devised, will pay due attention to the keeping up of those graves and grave-stones of my family, which are in the church-yard of F. in the said county, and to which grave-stones I have lately put head and foot stones. I give and bequeath unto my dear wife, and to my only son S. K. and to my son in law M. R. and to my only daughter R. M. D. his wife, the sum of —*l.* a piece for mourning; and for the like purpose I give unto C. my son's wife, the

Directions  
for burial.

**No. 3.**  sum of —*l.* and to her two sons, U. S. W. and I. S. W. —*l.* a piece, and to my niece A. L. the sum of —*l.*; I also give and bequeath unto my said wife all the ornaments of her person, and all my jewels, plate, linen, china, and all my household goods and furniture whatever and wheresoever, and all my books, and all my horses and other cattle, and my chaise, carts, carriages, and implements of husbandry, and also all my stock of wines and other liquors whatever, to hold to her as her own absolute property; I also give to my said wife the use and enjoyment of all my pictures, prints, and drawings, during her life, and from and after her decease I give to my daughter R. M. D. the picture of herself; but the rest of my pictures, and all my prints and drawings, I give to my said son S. K. I give and bequeath to I. N. of T. in the said county, esquire, and to C. B. the younger, of W. in the said county, esquire, the sum of —*l.* a piece, to be laid out in the purchase of some small piece of plate, to be kept by them respectively as a memorial of the friendship subsisting between us. I order and direct the sum of —*l.* to be divided as my wife shall think proper, or in case of her death as my said son shall think proper, among such of the poor persons resident in or belonging to the parish of St. L. in I——— aforesaid, where I live, as shall happen to be upon my Christmas list, and to have received a small donation by my order at the Christmas preceding my death. I likewise order and direct the sum of —*l.* to be divided or given as my wife shall think proper, to or amongst any poor family or families of the aforesaid parishes of ——— and ——— which shall seem to her to be most deserving of such reward or assistance: and the rest, residue, and remainder of my personal estate not hereinbefore specifically bequeathed, after payment of my debts, legacies, funeral, and testamentary charges, I give and bequeath to the said G. H. and C. B. their executors, administrators, and assigns, upon and for such and the like trusts, intents, and purposes as are hereinafter mentioned and declared respecting the rents, issues, and profits of the hereditaments hereinafter given and devised to them for the term of 500 years, during the continuance thereof. I nominate and appoint my said wife M. K. sole executrix of this my last will and testament,

Charitable  
bequests-

thinking it may be more readily executed by one person than by two, yet I earnestly request and hope that my said son will to the utmost of his power aid and assist his mother in the due execution thereof. And as to, for, and concerning my messuages, farms, lands, tenements, and hereditaments next hereinafter mentioned, (that is to say) ————— I give, devise, and confirm the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and from and after her decease unto and to the use of my said son S. K. his heirs and assigns, for ever: And as to, for, and concerning my messuage or tenement, farm, lands, and hereditaments in C— aforesaid, now in the occupation of ———, I give and devise the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and immediately from and after her decease then as to, for, and concerning the same premises, and from and immediately after my own decease as to, for, and concerning the following estates, (that is to say) my freehold messuages, &c. [various parcels and descriptions of freehold property] I give and devise the same, with their respective appurtenances, unto and to the use of them the said G. N. and C. B. their executors, administrators, and assigns, for and during the term of 500 years, to be computed from the day of my decease, and from thence next ensuing, and fully to be complete and ended without impeachment of waste; but nevertheless upon and for the trusts, intents, and purposes hereinafter expressed and declared concerning the same term; and (subject as aforesaid) from and immediately after the determination of the said term of 500 years, and in the mean time subject thereunto and to the trusts thereof, unto and to the use of the said S. K. and his assigns, for and during the term of his natural life without impeachment of waste, and from and after his decease [to the children of the said S. K. the son in strict settlement, remainder to the testator's right heirs]. And as to, for, and concerning the said term of 500 years hereinbefore limited to the said G. N. and C. B. their executors, administrators, and assigns as aforesaid, I will and declare that the said G. N. and C. B. their executors, administrators, and assigns, do and shall stand

A term of  
500 years  
created.

Trusts of  
the term  
declared.

**No. 3.** and be possessed of the messuages, lands, and hereditaments comprised therein, upon the trusts following, (that is to say) upon trust that they the said trustees, or trustee for the time being, do and shall with and out of the respective rents, issues, and profits of the said hereditaments and premises therein comprised, or by mortgage or sale of a competent part of the same premises for all or any part of the said term, or by both of those means (1), raise and levy such sum and sums of money as shall be necessary for paying so much of my debts, legacies, funeral, and testamentary charges as my personal estate, not specifically bequeathed, may happen to fall short in payment of, and do and shall apply such money so to be raised in discharge thereof accordingly, and subject thereto, upon trust that they the said trustees, or trustee for the time being, do and shall by both or either of the aforesaid means raise, levy, and pay the following clear annual sum of money during the life of my said daughter S. D. (that is to say) the annual sum of ——.l. (if my wife shall survive me) as long as my said daughter and my said wife shall both be living, and in case my said daughter shall survive my said wife, then the annual sum of ——.l. during the residue of the life of my said daughter, but if my said wife shall die in my life-time, then the said annual sum of ——.l. to commence from the time of my death; the said annual sum of ——.l. or ——.l. as the case shall happen as aforesaid, to be paid by equal half-yearly payments, on the 24th day of June and 26th day of December in every year, clear of taxes, and without deduction, the first payment of the said annual sum of ——.l. to be paid on such of the said days as shall first happen next after my decease, in case my said wife shall be living at such day of payment, and the first payment of the said annual sum of ——.l. to be made on such of the said days as shall first

To make up the deficiency of the personal estate in paying funeral and testamentary charges, and debts and legacies.

And subject thereto to pay an annual sum to his daughter, to be increased after the death of the testator's widow, and to be paid to her separate use.

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(1) These last words seem to be proper, since without such words, or the addition of the plural words "sales and mortgages," it might be doubted whether the trustees having raised the money by mortgage could afterwards sell to pay off that mortgage, however beneficial such an arrangement might be; see 12 Vcz. jun. 48.

happen next after the decease of the survivor of me and my said wife; and upon trust that they the said trustees, or trustee for the time being, do and shall pay such of the said annual sums of —*l.* and —*l.* as shall be subsisting or ought to be raised as aforesaid, unto such person or persons only, and for such intents and purposes only as my said daughter, by any writing or writings under her hand, shall direct or appoint, notwithstanding her present or any future coverture, and for want of such direction or appointment then do and shall, [for the separate use of the daughter, vide ante, page 252,] and in case my said daughter shall have one or more child or children then upon trust that they the said G. N. and C. B. their executors, administrators, and assigns, do and shall, after the decease of my said daughter, but not before, and when and as any such child or children shall attain their respective age and ages of 21 years, (if my said daughter shall then be dead,) by both or either of the aforesaid means (but subject and without prejudice to the trusts hereinbefore declared concerning the same term) raise and levy such sum or sums of money, for the portion or portions of such child or children, as is or are hereinafter mentioned, (that is to say) if there shall be only one child of my said daughter, who shall attain the said age of 21 years, then the sum of —*l.* for the portion of such one child: If there shall be two such children, and no more, who shall live to attain that age, then the sum of —*l.* for the portions of such two children, the sum to be equally divided among them; and if there shall be three or more such children, who shall live to attain that age, then the sum of —*l.* for the portions of such three or more of them, the same to be equally divided between or among them; such portion or portions as is or are hereby provided for such child or children, to become a vested interest, or vested interests, in him, her, or them respectively, as and when he, she, or they respectively shall attain the age of twenty-one years, after the decease of my said daughter, to be paid at the end of six calendar months next after their attaining such age and ages, with interest for such six months, at the rate of —*l.* per cent. per annum. But as to such of them as shall attain that age in the-life-time of my said daughter, the payment of their por-

And after the death of the daughter to raise portions for her children, to vary with the number and to become vested as they attain their ages.



## No. 3.

And in the mean time, to raise by way of maintenance for each, an annual sum equivalent to the interest of their respective portions.

And if no child to take such benefit, then to raise a gross sum to be disposed of among specified persons, according to the daughter's appointment.

tions shall be postponed until the end of six calendar months, next after her decease, and to be paid with like interest for such six last-mentioned months: and upon this further trust, that the said G. N., and C. B., their executors, administrators, or assigns, do and shall, by both or either of the aforesaid means, raise, levy, and pay, such annual sum or sums of money, for or towards the maintenance and education of such child, or children, of my said daughter, as shall be under the age of twenty-one years, at her decease, as shall be equal to the interest of his, her, or their expectant portion, or respective portions, at the rate of ——— per cent. per annum, until the same shall respectively become vested as aforesaid. And upon this further trust, that if my said daughter shall not have a child, or having any such child or children, they shall all die under the age of twenty-one years, so as not to become entitled to receive the portion and portions hereinbefore provided for them as aforesaid, then upon trust, that the said trustees, or trustee, for the time being, do and shall, by both or either of the aforesaid means, (but subject, and without prejudice, as aforesaid,) raise and levy such sum or sums of money, not exceeding in the whole, the sum of —l. of lawful money of Great Britain, as my said daughter by any deed or deeds, writing or writings, with or without power of revocation, under her hand and seal, attested by two or more credible witnesses, or by her last will and testament, or by any writing in the nature of her last will and testament, to be signed and published in the presence of, and attested by three or more such witnesses, shall, notwithstanding her present, or any future coverture, think fit to direct and appoint, and do and shall pay such sum or sums, if any, as shall be so directed to be raised, not exceeding the said sum of —l. as aforesaid, unto or amongst such one or more of the present, or any other son or sons, daughter or daughters, of my said son, S. K., at such time or times, and in such share and shares, manner and form, as my said daughter shall by the same, or any other deed, writing or writings, under her hand and seal, with or without power of revocation, so attested as aforesaid, or by such last will and testament, or writing in nature thereof, as aforesaid, direct or appoint. And in order to facilitate any

mortgage, or sale of mortgages, or sales of the same messuages, farms, lands, tenements, and hereditaments, or any part or parts of them, for any of the trusts and purposes aforesaid, I hereby declare, that the receipt or receipts of the said trustees, or trustee, for the time being, shall be a sufficient discharge, or sufficient discharges, to the mortgagee or mortgagees, purchaser or purchasers, of any of the same messuages, farms, lands, tenements, and hereditaments, or of any part or parts thereof, for his, her, or their mortgage, or consideration-money, or for so much thereof as in such receipt, or receipts, shall be expressed to be received, and that such mortgagee or mortgagees, purchaser or purchasers, his, her, or their executors, administrators, or assigns, shall not afterwards be accountable for any misapplication, or non-application thereof, neither shall he, she, or they respectively be concerned to enquire into the necessity of making any such mortgage, or sale, for any of the purposes aforesaid. Provided, and my will further is, that it shall be lawful for the said trustees, or trustee, for the time being, (with the consent of my said son, signified in writing, under his hand, if living, and if not, then at the discretion of them, or him, my said trustees, or trustee,) to apply so much of the rents, issues, and profits of the premises comprised in the term, as to them or him shall seem expedient, in or for the purposes of repairing, or rebuilding any of the messuages or buildings upon the said farms and lands, or improving the same, or any of them, and also to fell, cut down, and dispose of any of the timber, or trees, growing, or being thereupon, for all or any of the last-mentioned purposes; and, subject to the trusts, interests, and purposes, hereinbefore declared, of and concerning the messuages, farms, lands, tenements, and hereditaments, comprised in the said term of 500 years, I declare my will and mind to be, that the said trustees, or trustee, for the time being, do and shall, during the first 21 years of the said term of 500 years, to be computed from the 5th day of April, or 10th day of October, next preceding my death, lay out, and invest, (with the consent of my said son, if living, in writing, under his hand, and if not, then at the discretion of such trustees, or trustee), the residue and clear

No. 3.

to be discharges, and the mortgagees and purchasers not to be answerable for the application of the mortgage or purchase monies.

Trustees empowered with consent of the son to apply necessary sums out of the rents and profits in repairing and rebuilding.

And subject to the trusts above-mentioned, to invest the surplus rents, and profits, in the funds, during the first 21 years of the term, after testator's death.

No. 3.

surplus of the yearly rents, issues, and profits of the said premises, remaining after paying such the said annual sums of —*l.* or —*l.* for the separate use of my said daughter, and such annual sum as shall, for the time being, be applicable for such maintenance as aforesaid, and the interest of any such portion, or portions, hereinbefore directed to be raised, as shall be carrying interest, and also of any such mortgage, or mortgages, as may be made in pursuance of the trusts hereinbefore declared, and after application of such sum or sums of money, as it may be thought proper to dispose of, for such rebuilding, repairing, or improving, as aforesaid, in the public stocks, or funds of Great Britain, or in or upon securities of that government, or real securities in England, at interest, and in like manner, from time to time, to invest the dividends, interest, or annual proceeds of such stocks, funds, or securities, so as within that period to produce as great an accumulation of capital, as reasonably may be, in the nature of compound interest. Provided, nevertheless, and I declare my mind and will to be, that such investments shall cease at the end of 10 or 15 years of the said term of 21 years, if my said son shall in his life-time so direct the same, by any writing under his hand, to be attested by two or more credible witnesses, and then I will and direct, that the said trustees, or trustee, for the time being, do and shall stand possessed of, and interested in such stocks, funds, or securities, as shall have been so from time to time purchased, upon the trusts hereinafter declared concerning the same. Provided, that when, and so soon as all and every the trusts hereinbefore declared concerning the said term of 500 years, shall in all things have been fully performed, satisfied, or discharged, or shall have become incapable of being carried into execution, and they, the said G. N., and C. B., and each of them, and the executors, administrators, and assigns, of them, and each of them, shall be fully reimbursed and satisfied, all costs, charges, and expences, occasioned by or relating to the trusts of the said term of 500 years, then the same term, or so much as shall remain undisposed of, for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes


Proviso for  
the ceasing  
of the term.

whatever, (any thing herein, &c.) Provided also, and I hereby declare, that it shall and may be lawful to and for my said son, S. K., from time to time, and at all times during his natural life, and after his decease, to and for the person or persons, who, for the time being, shall, under, and by virtue of the limitation hereinbefore contained, be entitled to the hereditaments comprised in the said term of 500 years, either in possession, or in remainder, after the determination of the same term, if he, she, or they shall have attained the age of 21 years, and if not, then for his, her, or their guardian or guardians, (power to lease, see before, p. 253), And as to, for, and concerning all my copyhold messuages, farms, lands, tenements, and hereditaments, with their respective appurtenances, not hereinbefore disposed of for the benefit of my said wife, during her life, with remainder for the benefit of my said son and his heirs, I give and devise the same unto, and to the use of the said S. K., my son, his heirs, and assigns, for ever; yet nevertheless upon such trusts, intents, and purposes, as will correspond with the uses, trusts, interests, and purposes hereinbefore expressed, and declared, of and concerning my said freehold messuages, farms, lands, tenements, and hereditaments, comprised in the term of 500 years, either in possession, or in remainder, after the decease of my said wife, and with which estates such copyhold premises are respectively held and enjoyed, and under, and subject to such and the same powers, provisos, and declarations, or as near thereto as may be, and the different nature of the tenure, and the rules of law and equity will admit of. And as touching such stocks, funds, and securities as shall have been so purchased as aforesaid, I will and declare that the said trustees thereof, for the time being, do and shall stand possessed of, and interested in, the same, upon the trusts following, that is to say, upon trust, that they or he do and shall pay unto, or empower my said son, (if living,) or his assigns, to receive the dividends or interest thereof, during his natural life, and from and immediately after his decease, (or in his life-time, if he shall so direct, by any such deed or writing, as hereinafter is mentioned,) do and shall pay or transfer such stocks, funds, or securities, unto such one child,

No. 3.

Trusts of  
the accu-  
mulated  
stock.

To permit  
the son to  
receive the  
dividends  
for life, and  
after his  
death to go  
according  
to his ap-  
pointment

**No. 3.**  or to and amongst such two or more of the children of my said son, (other than and except an eldest, or an only son, for the time being,) at such age or time, and if more than one, at such ages or times, in such shares and proportions, and in such manner and form as my said son, by any deed, &c. shall direct or appoint; and in default of such direction or appointment, then the same shall become vested in such two or more of the children of my said son (other than and besides such eldest or only son,) as shall attain the age of 21 years, in equal shares, but if there shall be no more than one such child, (other than and besides such eldest or only son,) who shall attain such age, then one moiety only thereof shall vest in such child, and the other moiety shall be considered as having vested in my said son, and be paid or transferred accordingly to his executors, administrators, or assigns: and in case there shall be no child of my said son, (other than, &c.) who shall attain the said age, then the whole of such stocks, funds, or securities, shall be considered as having vested in my said son, and be paid or transferred accordingly, to his executors, administrators, or assigns; and as to any dividends or interest which may arise in respect of such last-mentioned portion, or portions, from the decease of my said son, until the vesting thereof, I will and direct that such dividends or interest shall be invested in such stocks, funds, or securities, (to accumulate as before).

among his  
younger  
children.

## No. 4.

*A Will, comprising various dispositions of real and personal Estate, partly of testator's own estate, and partly in performance of various trusts and obligations imposed on him by antecedent settlements.*

**THIS** is the last will and testament of me J. N., of \_\_\_\_\_ . Whereas, under, and by virtue of the settlement, made previous to my marriage with Mary, my wife, (then Mary S.) certain hereditaments at W——, (whereof she was seised in fee simple,) stand limited to the use of me for life, with remainder to the use of the trustees therein named, and their heirs, during my life, in trust to preserve the contingent remainders ; remainder to the use of my said wife for life ; remainder to the use of all and every the child and children of our marriage, in tail, with cross remainders ; remainder to such uses as my said wife shall, by such deed or will, as is therein mentioned, appoint, and in default of such appointment, to the use of her right heirs ; and by the same settlement, her portion, consisting of the sum of 1500*l.*, was agreed to be vested in the trustees therein named, upon trust, after the solemnization of the said marriage, to pay the interest thereof to me during my life, and after my decease, to my said wife, for her life, and after the decease of the survivor of us upon such trusts, as to the principal money, for the benefit of the children of the said marriage, as therein mentioned, and in case there should be no such child or children, or being such, all of them should die before such ages or times as are therein mentioned, upon trust, to apply the said sum of 1500*l.* as my said wife should, by such deed or will, as is therein mentioned, appoint, and in default of such appointment, to her executors, administrators, or assigns ; and my father, Richard N., thereby covenanted, that in case the then intended marriage should take effect, and the said Mary should survive me, he, his heirs, executors, or administrators, would yearly pay unto her, during her life, such sum of money, as, with the clear yearly

Recital of provisions and limitations of real and personal property, under settlement by deeds and wills.

**No. 4.** produce of her said real and personal estate, thereby settled, or agreed to be settled, would make up the clear yearly sum of 200*l.*, and my said father thereby covenanted to pay the sum of 2000*l.* to the said trustees therein named, upon such trusts, for the benefit of the children of the said marriage, as are therein mentioned : and whereas the said portion, or sum of 1500*l.* was received by me, and yet continues in my hands, and there hath not, as yet, been any issue of the said marriage ; and whereas my said late father, Richard N., by his last will and testament, in writing, bearing date the — day of —, 17—, after confirming the said settlement, and ordering his debts to be paid out of his personal estate, devised his freehold messuages, lands, and tenements at B——, in the county of —, to the use of a trustee therein named, for the term of 500 years, upon the trusts thereafter declared, and hereinafter in part mentioned ; remainder to the use of me for life, without impeachment of waste ; remainder to the use of trustees, and their heirs, during my life, in trust, to preserve the contingent remainders ; remainder to the use of my first, and every other son successively, in tail male ; remainder to the use of my daughters, as tenants in common, in tail, with cross remainders ; remainder to his nephew, William N., for his life ; remainder to the use of trustees, and their heirs, during the life of the said William N. in trust, to preserve the contingent remainders ; remainder to the use of James N., son of the said William, for his life ; remainder to the use of trustees and their heirs, during his life, in trust, to preserve the contingent remainders ; remainder to the use of the first, and every other son of the said James N. successively, in tail male ; remainder to the use of the male heir, who should be lawfully entitled, for the time being, to the ancient estate, at G. belonging to the N——'s, for the life of such male heir ; remainder to the use of trustees, and their heirs, during the life of the said male heir, to preserve the contingent remainders ; remainder to the use of the first, and every other son of the said male heir successively, in tail male, reversion to the use of his (my said father's,) right heirs ; and he gave to his wife Jane, an annuity of 100*l.* for her life, to be paid out of his real estate, and declared that the said term of

Limitations by way of strict settlement recited.

500 years, was so limited to the use of the trustees thereof, as aforesaid, for securing the payment of the said annuity, and for raising all such sum or sums of money as he should have to pay, in consequence of his covenant in my said marriage, and he gave his leasehold estate to trustees, upon trust, to permit the person, who for the time being, should be in possession of his freehold estates, by virtue of his will, to receive the rents and profits thereof, subject to the payment of the said 100*l.* annuity, and the sum he had engaged to pay, under my said settlement; and he gave all his monies at interest, and securities for the same, and the interest thereof, and 500*l.* stock in the ——— canal, (200*l.* whereof then stood, and is yet standing in my name,) and all profits and dividends belonging to the same, and also all his silver plate, household furniture, beds, bedding, pictures, prints, watches, books, live cattle, husbandry gears, to trustees, upon trust, to pay out of his said monies, his debts, funeral expences, the probate of his will, and in the next place, to pay to me the sum of 500*l.* upon my succeeding to the rectory of G. by three equal payments, in each year, next after my institution, for the purpose of being laid out at my discretion, in the improvement of the glebe lands, and buildings; and as to the remainder of the money, to lay out the same, with the approbation of the person, who, for the time being, should, by virtue of his will, be in the possession of his real estate, in the purchasing of freehold premises, in the county of ———, to be conveyed to the trustees, upon the same trusts as the other real estates, by virtue of his will, were limited to, or such of them as should be capable of taking effect: as to husbandry gear, and quick goods, they were to be sold, and the money arising therefrom to be invested in the purchase of freehold lands, within the county of ———, for the uses limited of his other estates, by his said will; and as to household furniture, beds, bedding, rings, watches, plate, pictures, &c. he gave to his said wife such parts thereof, as he should particularise in a schedule, for her life; and as to such parts thereof as should not be so directed, and those so directed after her death, the trustees were to permit the person for the time being, entitled to his real estate, to have

Disposi-  
tions of  
personalty  
by his fa-  
ther's will  
recited.



**No. 4.** the use thereof; and, until such purchases as aforesaid shall be made, the trustees were to continue the monies at interest, or to call in and replace the same, either on mortgages, or invest the same in the public funds, and pay or permit the person lawfully in possession, for the time being, of his real estates, to receive the interest and dividends of the same; and as to the said 500*l.* canal stock, the trustees were to permit the person or persons, who, for the time being, would be entitled to the premises, to be purchased as aforesaid, or until purchased, the interest of the money intended to purchase the same, to receive the dividends thereof, and afterwards to transfer the principal to such person and persons, his, her, and their executors, administrators, and assigns, in whom the premises so to be purchased, (when purchased), his or their heirs, or assigns, should become absolute at law, by virtue of his will. And he made me (subject, and without prejudice to any of the trusts therein contained,) executor of his said will. And whereas my said father departed this life in the year ———, without revoking or altering his said will, leaving me, his only child, and heir at law; and shortly after his decease, I proved the same will, in the prerogative court of Canterbury. And whereas, exclusively of the specific estates, to the enjoyment whereof I am entitled for my life, under my said father's will, I remain possessed of the said sum of 500*l.* canal stock, and of the sum of 70*l.* like stock, which my said father purchased after the making of his said will, and the residue of my said late father's personal estate has been permitted to remain in my hands; and it will appear by my accounts, as executor of my said father's will, that such residue amounts to the sum of ———*l.* And whereas, the said Jane, my late mother, departed this life in the year ———, having first duly made her last will and testament, whereby she gave to me all arrears which should be due, in respect of her said annuity of 100*l.* at the time of her death, upon my paying to her relation, Mary R——, an annuity of 10*l.* during her life; and gave the use of her watch to me for life, and at my decease, the same, and the rings, pictures, and trinkets, whereof she was possessed, she directed to go to the uses thereof directed by her

Debits  
himself as  
his father's  
executor on  
account of  
the residue  
of his per-  
sonal es-  
tate.

said husband's will : and I having elected to take the benefit of the bequests in her said will, have paid the said annuity of 10*l.* to the said Jane R——, up to the last day of payment thereof, preceding the date of this my will. And whereas, I am desirous, that as well the trust in my said marriage settlement, regarding the said portion or sum of 1500*l.* as those of my said father's will, touching his personal estates, or such and so many thereof as remain to be performed, and also the trusts in my said mother's will, touching the specific chattels therein-mentioned, should be performed and carried into execution, I therefore direct, that ——— and ———, my executors, hereinafter appointed, do and shall, as soon as conveniently may be, after my decease, pay the sum of 1500*l.* in satisfaction of the debt owing from me in respect of my having so received my wife's portion of that amount as aforesaid, with interest for the same, after the rate of 5*l.* for 100*l.* for a year, to the trustees or trustee, for the time being, in my said marriage settlement, upon such of the trusts therein declared, concerning the same respectively, as shall be then subsisting, or capable of taking effect : and I further direct, that my said executors do and shall, so soon as conveniently may be after my decease, transfer the said sum of 500*l.* navigation stock, unto the trustees or trustee, for the time being, who shall be then entitled to receive the same, under my said father's will, upon such and the same trusts therein declared, concerning the same respectively, as shall be then subsisting, or capable of taking effect ; and also that they, my said executors, do and shall, so soon as conveniently may be, after my decease, deliver over the specific things, to the enjoyment whereof I am entitled for my life, under the said will of my mother, to the person or persons, who, for the time being, shall be then entitled to receive the same, upon such of the trusts therein contained or referred to, as shall be then subsisting, or capable of being performed, and deliver over such plate, furniture, pictures, rings, watches, and books, as my said late father died possessed of, and that have come to my hands, the books being mentioned in a catalogue made by him, and the plate being distinguished by the armorial bearings of his and my late mother's family, or

No. 4.

That testator is desirous of performing the trusts of his marriage settlement, and his father's and mother's will before mentioned.

Direction to his own trustees and executors, to make good the sum of 1500*l.* which he owes to the trustees of his marriage settlement.

To transfer the 500*l.* navigation stock to the trustees of his father's will.

To transfer the specific things, which, under his mother's will, he was to enjoy for life, to the persons entitled to receive the same after him.

To pay over the sum stated in his (the testator's) account, as his father's executor,

**No. 4.** one of their families; and pay over, to the person or persons entitled to receive the same under my said father's will, the said sum of ———*l.* (which is stated in my said account as executor to be the amount of the balance owing from me, as such, in respect of the clear residue of my said father's personal estate, to be laid out in the purchase of lands, as aforesaid, or such other balance or sum of money as may be found due on the taking of such account. And whereas it will appear from my said account, as executor, that some articles of my said late father's furniture were sold by me, which produced the sum of ———*l.* I direct my executors to make good the same to the said trust estate, either by the delivery of furniture of mine of the like value, or by payment of that sum, to the person or persons entitled for the time being to receive the same under my said father's will. And in as much as I have in my hands, as executor as aforesaid, the sum of 26*l.* for which I have taken credit in my said account as a debt due from my said late father's estate to or in trust for ——— charity, the interest whereof has been for many years past applied for the charitable purpose hereinafter mentioned, I therefore direct my executors to discharge that debt by payment of the said sum of 26*l.* to such persons, to be approved by the rector, for the time being, of the parish church of G. aforesaid, as they shall think fit, upon trust to place the same out at interest on government or real securities, with liberty of transposing the same, and to pay the interest or dividends arising therefrom, to the master, for the time being, of the endowed school at G. aforesaid, for educating eleven poor boys in the said school to be nominated from time to time by such rector, or in his absence from the said cure, by the officiating minister, for the time being, of the said church. And I give unto my said wife an annuity or yearly sum of 10*l.* of lawful money of Great Britain, during her natural life, in addition to her provision under my said marriage settlement and the trusts of the term of 500 years created by my said father's will, the same to be paid clear of taxes and without deductions, by equal half yearly payments, the first payment thereof to be made at the expiration of six

to be the balance owing from him, as such executor, in respect of the residue of his father's personal estate, to the person or persons entitled to receive the same under his father's will. To replace some articles of his father's furniture, sold by him. And to pay over a sum left by his father to a charity.

Additional annuity to testator's wife.

calendar months next after my decease. And I give to my said wife absolutely (1) such of my household furniture and linen (2) as she shall select, not exceeding, in the whole, the value of ——*l.* (such value to be ascertained by the general appraisement which I desire to be made of my furniture) except locks, iron ovens, bells fixed, fixed stoves, and such other things as are or may be fixed or fastened to the mansion house at G. wherein I now reside, my will being that such excepted articles shall go along with the said mansion-house, and be enjoyed by the person or persons for the time being entitled to the possession thereof, as heir-looms, so long as the law will permit. And I give to her my said wife the use and enjoyment of such plate as I have purchased, and whereon are engraven the armorial bearings of her or my family, or one of our families, during her life. And from and immediately after her decease I give the same to George N., second son of the said William N., if he shall be then living, absolutely, and if he shall be then dead, unto Peter N., third son of the said William N., if he shall then be living, absolutely; but if neither of them the said George

No. 4.

Furniture  
to his wife  
absolutely.

Except articles fixed or fastened to the house; which are to go with the house and be enjoyed as heir-looms. The plate, whereon there are armorial bearings; to the wife for her use, during her life, and after her decease, to two persons named in succession, and if neither should be living at testator's decease to go together with the personal estate.

(1) Where a testator gives to A. during her natural life, his house at B. with all the goods that shall be found therein at the time of his decease, the word *with* so conjoins the devise of the house and household goods, that the devisee can have no longer interest in the latter than was expressly limited in the former. 1 Atk. 470, *Luke v. Bennet*. And where a testator gave to his wife all his household goods, furniture, plate, linen and china in his house at E. or to the house belonging, and also the said house, gardens, &c. so long as she continued his widow, and no longer; Lord Hardwicke held that the household goods, furniture, &c. were put under the same restrictions as the house itself. *Richards v. Baker*, 2 Atk. 321. Such a gift will not bar the wife of her paraphernalia. 2 Atk. 216. See also 3 Atk. 369 and 393.

(2) A bequest of the best of my linen, or of some of my best linen, is void for uncertainty; but a bequest of such of my linen as my executor shall think fit, or as I. S. (the legatee) shall chuse, is good; *Peck v. Halsey*, 2 P. Wms. 387.

**No. 4.** *N.* or *Peter N.* shall be then living, then the same to be considered as part of the residue of my personal estate; and my will is that an inventory shall be made of such plate, and that my said wife shall, on receiving the same, be required to sign such inventory, accompanied with an undertaking for the delivery thereof by her representatives, upon or immediately after her decease, to the person or persons who shall be entitled to the same under this my will. I give to *S. P.* the sum of 100*l.* and to *R. S.* the like sum of 100*l.* and I desire that each of them may have decent mourning, at the discretion of my executors. I give to my executors the sum of 100*l.* a piece, as an acknowledgment for the trouble that they may have in the execution of this my will. I give to the said *James N.* the sum of 30*l.* upon trust, to place out the same on government or real securities at interest, in the name of such persons as he, his executors or administrators, shall think proper, with liberty to the trustees or trustee thereof for the time being, of transposing the same, to the intent that such trustees or trustee do apply the interest or dividends arising therefrom, for or towards the education of four poor boys, at or in the said school at *G.* aforesaid, to be from time to time nominated by such trustees or trustee for the time being. I give the sum of 100*l.* to the treasurer for the time being of the infirmary of ———, in the county of ———, to be applied to the charitable purposes of that institution; and I direct my executors to distribute the sum of ———*l.* among such poor persons attending divine service in the parish church of *G.* aforesaid, the Sunday next after my death, and in such proportions as they my said executors shall think proper; and I desire that all my servants who shall be in my service at the

His wife to  
sign an in-  
ventory\*.

Legacies  
and mourn-  
ing.

Remunera-  
tion to exe-  
cutors.

Charity le-  
gacies.

Foreducating  
four  
poor boys.

To a hos-  
pital.

A sum to  
be distri-  
buted as  
alms.

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\* The effect of a direction for an inventory is held of itself to limit the enjoyment to the life only of the legatee, *Southey v. Lord Somerville*, 13 Vez. Jun. 493. And a devisee for life *must* sign an inventory to be deposited by the master, for the benefit of all parties. *Leeke v. Bennet*, 1 Atkins, 471. *Bill v. Kynaston*, 2 Atk. 81.

time of my decease, may receive a whole year's wages, to be added to the sum or sums then due to them for wages (3). And as to the residue of my personal estate, not otherwise disposed of by this my will, I give the same to my said executors, upon trust, that they, or the survivor of them, or the executors or administrators of such survivor, do and shall place out the same at interest in some of the parliamentary stocks or funds of Great Britain, or on real securities in England at interest, and do and shall from time to time vary, alter, or transpose the same for other stocks or funds, or securities of the like nature, when and so often as it shall seem expedient; and do and shall, after paying and keeping down the said annuity of 10*l.* hereinbefore given to my said wife for her life, and also the said annuity which I am liable to pay to the said Mary R. during her life, in the mean time, until the capital in the respective shares thereof shall become payable or transferable as hereinafter is mentioned, invest the interest or dividends thereof, as and when the same shall amount to 100*l.* in like stocks, funds, or securities, so as to cause the same to accumulate in the nature of compound interest; and do and shall pay or transfer one third part of all such stocks, funds, and securities, but subject and without prejudice to the payment of the said annuities unto the said George N. as and when he shall attain the age of 21 years; one other third part thereof unto the said Peter N. as and when he shall attain the age of 21 years; and the remaining third part unto Maria N. daughter of the said William N. as and when she shall attain her age of 21 years; and in case any one or more of them the said George N. Peter N. and Maria N. shall die without having attained the said age, then the share or shares of him or them so dying, of and in the said stocks, funds or securities, shall go and be paid or transferred, subject and without prejudice as aforesaid, to the survivors or survivor, or others or other of them, as and when their respective original shares shall

No. 4.

The residue of the personal estate to be placed out at interest, with power to trustees to vary and transpose securities.

And after keeping down the annuities, to reinvest the dividends for the purpose of accumulation until the principal shall be payable, as after-mentioned. One third to be paid to —, one other third to —, and the remaining third to —, at 21, with chance of survivorship.

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(3) Under a general bequest to servants, a coachman provided with a carriage and horses let by the job, is not entitled. *Chilcot v. Bromley*, 12 Vez. Jun. 114.

**No. 4.** respectively become payable or transferable as aforesaid; and in case any other of them shall die without having attained the said age, then all and every the accruing share of shares shall be subject and liable to the like contingency of accruer or survivorship as is hereinbefore declared, touching his, her, or their respective original share or shares; and in case all of them the said George N. Peter N. and Maria N. shall die without any of them having attained the age of 21 years, then my will is that the whole of such stocks, funds or securities shall be transferred, but subject and without prejudice as aforesaid, to ———: And I appoint the said ——— executors of this my last will and testament. And as to my messuage, farm, and lands, situate at or near W. aforesaid, I give the same unto S. P. and R. S. their heirs and assigns for ever; and as to my messuages, farm and lands, situate in or near to the said settled estate of my family at G. aforesaid, which I purchased of William S. for the sum of 1900*l*. my messuage, farm and lands situate at or near to the said estate at B. aforesaid, which I purchased of James P., my lands in ———, contiguous to the said estate at B., and intermixed therewith, which I purchased of John G., my lands in ———, lying also contiguous to the said estate at B., which I purchased of Hugh H., which several premises so purchased by me are partly freehold, and partly leasehold, and also as to, for, and concerning my messuage, farm and lands, situate at B. in the said county, and all the rest of my freehold and leasehold estates whereof I have power to dispose in possession, reversion, remainder, or expectancy, and not hereinbefore disposed of, (4) I give the same unto and to the use of the said ——— and ———, their heirs, executors, administrators and assigns, upon the trusts hereinafter

And if neither of the three should live to become entitled, to be transferred to —.

Devise of his own messuages and farms not under settlement.

To trustees:

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(4) If a testator, in terms, excepts out of his residuary devise what he has before disposed of, such exception takes out of the residuary devise only the interest before given, not the things themselves; therefore if a life-estate only in any subject has before been given, the residuary devise comprehends and carries the remaining interest; see 3 Atk. 286.

expressed and declared of and concerning the same, that is to say, upon trust, that they and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, do and shall, as soon after my decease as they or he shall think fit, make sale and dispose of all and every my said freehold and leasehold estates, so devised to them as aforesaid, either together or in parcels, by public auction or private contract, as to them or him shall seem meet, for the most money that can be reasonably had or gotten for the same; and I do hereby declare that the receipt and receipts of the said, &c. and the survivor of them, the heirs, executors, administrators or assigns of such survivor, under their or his hands or hand respectively, shall from time to time be a good and effectual discharge, or good and effectual discharges, to the purchaser or purchasers of the same freehold and leasehold estate, or any part thereof, and his, her, or their heirs, executors, administrators and assigns, for his, her, or their purchase-money, or so much thereof as in such receipt or receipts shall be expressed to be received, and that such purchaser or purchasers, his, her, or their executors, administrators or assigns, shall not be answerable or accountable for any loss, misapplication or non-application of such purchase-money, so expressed to be received; and as to the money arising from such sale or sales as aforesaid, (as to which I direct a separate account to be kept,) my will is, that the same shall be in the first place applied in making good the deficiency, if any shall then be, of my personal estate, not specifically bequeathed, in paying my debts, funeral, and testamentary charges and legacies, (save those for charitable purposes) and that the residue of such monies, or the whole thereof, if there shall be no such deficiency, shall be paid to such person or persons, and be applied for such intents and purposes, as the residue of my personal estate is hereinbefore directed to be paid and applied; and as to the rents, issues and profits of the said estates, until sale thereof, I will that the same shall be paid and applied in such manner as the interest of the money arising by sale thereof would be payable or applicable to under this my will, in case such sale had taken place. Provided always, and it is my will, that in case the trustees or trustee

No. 4.

Upon trust  
to sell or  
dispose  
thereof.

Their re-  
ceipts to be  
discharged

And as to  
the money  
produced  
by the  
sales;  
in the first  
place to be  
applied in  
aid of the  
personal  
estate, in  
paying  
debts,  
charges  
and lega-  
cies:  
and sub-  
ject to such  
applica-  
tion in the  
first place,  
to be con-  
sidered as  
personal,  
and to go  
according  
to the dis-  
position of



## No. 4.

the residue of his personal estate.

Proviso, that if his late father's trustees should be willing to accept a conveyance of his estate at B—, at the sum at which the same was purchased by testator, it should be lawful for testator's trustees to make such conveyance, taking a discharge for so much of the balance of his father's residuary estate in his hands as the purchase money for such estate should amount to.

Leasing power to trustees.

for the time being of the residue of my said father's personal estate, shall be willing to accept a conveyance and assignment of my freehold and leasehold estates, in B—, aforesaid, or any of them, or any part thereof at the above-mentioned sum or sums of money, for which I purchased the same, then and in such case it shall be lawful for the trustees or trustee for the time being, under this my will, to make such conveyance and assignment accordingly, on obtaining a sufficient discharge for so much of the said balance on account of the said residuary estate in my hands, as the consideration money of the estate or estates comprised in such conveyance or assignment shall amount to. Provided always, and my will is, that it shall and may be lawful to and for the said, &c. and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, from time to time, by indenture or indentures under their or his hands and seals, or hand and seal, to demise or lease the said freehold and leasehold hereditaments, and premises, so vested in them as aforesaid, or such of them as shall be remaining unsold or undisposed of, during the minority of the said I. P. and R. S., or either of them, unto any person or persons, for any term or number of years not exceeding 21 years, in possession, not in reversion, or by way of future interest, so as upon every such lease there be reserved and made payable, during the continuance thereof respectively, the best and most improved yearly rent or rents that can be reasonably had for the same, to be incident to the reversion of the premises so to be demised, without taking any sum or sums of money, or other thing by way of fine or premium for the making of any such lease, and so as none of such lessees shall be made punishable for waste, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents, to be thereby respectively reserved, and that such lessees seal and deliver counterparts of such lease and leases. Provided, and my will further is, [proviso for substituting new trustees with safety, and indemnity clauses.]

## No. 5.

*Part of a Will directing a Settlement, with Limitations in a strict Form for preserving the Estate in the Family of the Testator.*

I GIVE and devise all and singular my freehold manors, messuages, lands, tenements, and hereditaments, wheresoever and whatsoever, not hereinbefore devised, unto the said J. W. and Sir R. J. B., their heirs and assigns, to hold the same to the uses following, that is to say, as to, for and concerning all such of the same hereditaments and premises, as are situate in the parish, township, or precinct of N—, in the county of N—, with their appurtenances, to the use of the said Sir G. C., R. M., and J. D., their executors, and administrators, for, and during, and unto the full end and term of 99 years, to commence and be computed from the time of my decease, without impeachment of waste, upon the trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisos and declarations hereinafter declared or expressed with respect thereto: and as to, for, and concerning all such of the same hereditaments and premises as are situate in the parishes, townships, or precincts of F. H. and S. and the parishes or townships contiguous and next adjoining thereto, with the appurtenances, except the manor or lordship of F—, and the advowson of the rectory of F—, to the use of the said Sir G. C., R. M., and J. D., J. C. J., and J. F., their executors, and administrators, for and during and unto the full end and term of 200 years, to commence and be computed from the time of my decease, without impeachment of waste, upon the several trusts, and to and for the several intents and purposes, and with, under, and subject to the several powers, provisos, restrictions, and declarations hereinafter expressed with respect thereto; and as to, for, and concerning, as well all and

Testator  
devises his  
real estates  
to the use  
of two sets  
of trustees  
successive-  
ly, for two  
several  
terms of 99  
and 200  
years.

No. 5.

And after the determination of the terms, to trustees and their heirs to convey in strict settlement to his son and his issue.

singular the said hereditaments, and premises comprised in the said several terms of 99 years, and 200 years respectively, from and after the end, expiration, or other sooner determination of the said terms respectively, and in the mean time subject thereto respectively, as also all and singular other the hereditaments lastly hereinbefore by me devised, from and immediately after my decease, to the uses of the said J. W. J., and Sir R. J. B., their heirs, and assigns for ever upon the trusts, nevertheless hereinafter mentioned, that is to say, upon trust; and I do hereby direct that they the said J. W., Sir R. J. B., or the survivor of them, or the heirs of such survivor, shall with all convenient speed after my decease, convey and assure all and singular the said manors, messuages, farms, lands, tenements, and hereditaments, subject as to such of the said hereditaments as are comprised in the said several terms of 99 years, and 200 years respectively, to the same terms respectively, and the trusts thereof, to and for the uses, intents, and purposes, upon the trusts, and with, under, and subject to the powers, provisos, conditions, restrictions, and limitations hereinafter expressed concerning the same, that is to say, to the use of my said son W. A., and his assigns, for and during the term of his natural life (1), without impeachment of waste, so far as is con-

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(1) Where the object of the testator is to preserve the devised estates as long as possible in his family, he may devise the fee to trustees and their heirs to the following uses, viz. to the use of his eldest son, for the term of 99 years, to be computed from the day of his, the testator's decease, and fully to be complete and ended, if his said son shall so long live, and from and immediately after the determination of the said term, and in the mean time subject thereto, to the use of the trustees and their heirs, during the life of the said son in trust, in the usual form, to preserve the contingent remainders, and from and after the decease of the said son, to the use of the first and other sons of that son in tail male, to be followed with like limitations successively, in favour of the younger sons of the testator, and their first and other sons respectively, remainder to testator's eldest daughter, for a similar term, if she should so long live, remainder to trustees to preserve contingent uses, and so on, with like limitations successively in favour of the testator'

sistent with the trusts of the same several term of 99 years, and 200 years respectively, while the same shall be respectively subsisting, and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of the said W. A., to the use of trustees in such settlement, to be named, and their heirs, during the life of the said W. A., in trust by the usual ways and means to support and preserve the contingent uses and estates thereby limited, but nevertheless to permit and suffer the said W. A., and his assignees, during his life to receive and take the rents, issues, and profits thereof, for his and their own benefit; and from and after the decease of the said W. A., to the use of the 1st, 2d, 3d, 4th, and all and every other son and sons of the body of the said W. A., lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another, as they respectively shall be in seniority of age and priority of birth, and the several respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that every elder of such sons, and the heirs male of his body issuing, shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing, and for default of such issue, to the use of my said younger son Edward, for and during the term of his natural life, without impeachment of waste, so far as is consistent with the trusts of the same several terms of 99 years, and 200 years respectively, whils

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younger daughters, with remainder to their first and other sons respectively, in tail male, in the same manner with successive remainders, if testator please, to daughters of sons, and then to daughters of daughters, as tenants in common in tail, with cross remainders.

The consequence of thus giving to the children of the testator terms of years determinable with their lives, instead of estates of freehold, will be, that they will not be able with the concurrence of the tenant in tail in remainder, unless the trustees will join in making a tenant to the præcipe, to suffer a recovery so as to defeat the remainders after such tenant in tail: the tenant in tail can, in such a case, only bar his own issue by a fine.


**No. 5.**  the same shall be respectively subsisting, and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of my said son Edward, to the use of such trustees in such settlement to be named, and their heirs, during the life of my said son Edward, in trust, by the usual ways and means to preserve and support the contingent uses and estates thereby to be limited, but nevertheless to permit and suffer my said son Edward, and his assigns, during his life, to receive and take the rents, issues, and profits thereof, for his and their own use and benefit, and from and after the decease of my said son Edward, to the use of all and every other the 1st, 2d, 3d, and 4th son and sons of the body of my said son Edward, lawfully begotten, severally, successively and respectively, and in remainder, one after another as they respectively shall be in priority of birth and seniority of age, and the several and respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that the elder of such sons, and the heirs male of his body issuing, shall always be preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of all and every other the son and sons of my body, lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another as they respectively shall be in seniority of age, and priority of birth, and the heirs male of the body and respective bodies of such son and sons lawfully issuing, so as that the elder of such sons, and the heirs male of his body shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and respective bodies issuing; and for default of such issue, to the use of trustees and their heirs, during the lives of my said daughters L. and C., and the life of the survivor of them, in trust to pay the rents, issues, and profits thereof to such person or persons respectively as they my said daughters respectively, during their joint lives, by any writing or writings under their respective hands, shall from time to time as the same respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have a power of disposing of more than

For default of issue of sons, to trustees during the lives of his two daughters, and the survivor of them, for their separate use respectively, with limitations to their re-

a moiety each of the said rents, issues, and profits, and for want of such direction or appointment, into the proper hands of them respectively in moieties, whilst both of them shall be living, for their respective, sole, and separate use, exclusively and independently of any husband or husbands, and not in anywise to be subject to the controul, debts, or engagements of their respective husbands; and from and immediately after the decease of either of my said daughters who shall first happen to die, then in case such daughter so dying shall leave any child or children, her surviving, in trust during the natural life of the survivor of my said daughters, to pay and apply one moiety or equal half part of the rents, issues, and profits of the said premises unto, between, or amongst, or for the benefit and advantage of such child or children, in equal shares and proportions, if more than one, and if there shall be only one such child, then for the benefit and advantage of such one child; and to pay and apply the other moiety of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time as the same shall become due or payable, but not by way of anticipation, direct or appoint, and for want of such direction or appointment, into the proper hands of such surviving daughter, for her sole and separate use exclusively and independently of any husband, and not to be in anywise subject to the controul, debts, or engagements of any husband; but in case such daughter so first dying as aforesaid shall not leave any child or children, her surviving, or leaving any such, all of them shall happen to die during the life of such surviving daughter, then upon trust, from and immediately after the decease or such failure of children of such daughter so first dying as aforesaid, as the case may happen, in trust, to pay and apply the whole of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time, during her life, as the same shall become due or payable, but not by way of anticipation direct or appoint, and for want of such direction or appointment into the proper hands of such surviving daughter, for her sole and separate use exclusively and independently of any husband, and not to be in

No. 5.

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 place till  
 both the  
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 prevent  
 alienation  
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 and other  
 sons of the  
 other  
 daughter  
 reciprocally.

**No. 5.**  anywise subject to the controul, debts, or engagements of any husband; and my will is that the respective receipts in writing of my said daughters, and the receipt of the survivor, notwithstanding any coverture, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents, issues, and profits to be paid as aforesaid, shall be good, and effectual releases and discharges for the rents, issues, and profits therein mentioned to be received; and upon further trust, during the lives of my said daughters, and the life of the survivor of them, to preserve the contingent uses and estates, to be limited as hereinafter mentioned; and from and after the decease of the survivor of them my said daughters, as to one moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter L. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter C. successively, according to their respective seniorities in tail male; and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter C. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter L. successively, according to their respective seniorities in tail male; and from and after the decease of both my said daughters, and failure of issue male of both their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of all and every the daughter and daughters of my said son W. A. if more than one as tenants in common in tail, with cross remainders in tail, between or among them; and if all his daughters but one shall die without issue, or he shall have but one daughter, to the use of such one or only daughter in tail; and for default of such issue, to the use of all and every the daughters and daughter of my said son Edward, if more than one, as tenants in common in tail, with cross remainders in tail, between and among them; and if all his daughters but one shall die without issue, or he shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, then as to one undivided

And after the decease of both daughters and failure of issue of both their bodies, then as to the entirety of the premises, to the daughters of testator's eldest son as tenants in common in tail, with cross remainders; and for default of such issue to the daughters of his second son in like manner; and for default of such issue then as to one moiety to the use of the daughter of testator's eldest

moiety or equal half part or share of the same hereditaments, to the use of all and every the daughter and daughters of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, to the use of all and every the daughter and daughters of my said daughter C. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of all and every the daughter and daughters of my said daughter C. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one, or only daughter, in tail: and for default of such issue, to the use of all and every the daughters and daughter of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and from and after the decease of both of my said daughters, and such failure of issue of both their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of my own right heirs. Provided always, and I do hereby declare my will and mind to be, that in the settlement so to be made as aforesaid, shall be contained a proviso, that all and every the person and persons, who, by virtue of the limitations to

No. 5.

est daughter, as tenant in common in tail, with cross remainders.

And in default of such issue to the daughters of his youngest daughter, in like manner.

And as to the other moiety to the use of the daughters of the youngest daughter, in like manner.

And in default of such issue to the daughters of the eldest daughter, in like manner.

And after the decease of both daughters, and failure of such last-mentioned issue of both their bodies, to the use of testator's own right heirs.

Clause binding the testator's descendants and possessors of his property, to take the name and use the arms of his family.\*

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\* It seems pretty well settled that this is not a condition precedent to the vesting, and therefore a tenant in tail may suffer a recovery without troubling himself to take the name, if he objects to it. Upon this question being put to the late Mr. Fearn, however, though he thought it not absolutely necessary, yet he said he would advise it to be done on the party's coming of age, before




**No. 5.** be therein contained, or of this proviso, shall become entitled to the possession, or to the rents, issues, and profits of the manors, and other hereditaments, in such settlement to be comprised, and who shall not then be called by the name, or use the arms of H. except as hereinafter excepted, or otherwise provided, do and shall, within the space of one year next, after they respectively shall become entitled to the possession, or to the rents and profits thereof: and also, that all and every the person or persons, whom the said L. or any issue female of my said sons or daughters respectively shall marry, shall and do, if the said L. or such other issue female respectively, as aforesaid, shall, at the time of such her or their marriage, or respective marriages, be so entitled as aforesaid, then within one year next, after the solemnization of the said marriage, or marriages, respectively; and if the said L. or such other issue female respectively as aforesaid, shall not be entitled at the time of such her or their marriage, or respective marriages, but shall afterwards, during her or their marriage, or respective marriages, become so entitled as aforesaid, then within the space of one year next after she or they shall severally become entitled as aforesaid, take upon himself, herself, and themselves, and use in all deeds and writings, whereto or wherein he, she, or they shall be a party or parties, and upon all other occasions, the surname of H. only, and no other surname: and also shall and do quarter the arms of H. with his, her, or their own family arms; and shall and do, within the space of one year, apply for, and endeavour to obtain an act of parliament, or proper licence from the crown, or take such other means as may be requisite and proper, to enable and authorize him, her, or them respectively to take, use, and bear the surname and arms of H.; and that in case any such person or persons shall refuse or neglect, or discontinue to take and use, such surname and arms, and to take such proper steps and means as may be requisite to enable and authorize him, her, or

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suffering the recovery, and the recovery to be suffered in the name directed to be assumed, to prevent all questions on the point. See the case of *Gulliver v. Ashby*, 4 Burr. 19291. Blackst. 607.

them so to do, within the space of one year as aforesaid, then from and after the expiration of the said space of one year, the use or estate, or uses or estates, so to be limited to him, her, or them respectively, so neglecting or refusing, shall cease, determine, and become utterly void, and that all the said manors, and other hereditaments, hereinbefore directed to be conveyed, and settled as aforesaid, shall in such case, immediately thereupon, go to the person or persons next in remainder, under the limitations in such settlement to be contained, in the same manner as if such person or persons, so neglecting or refusing, being tenant or tenants for life, were dead, or being tenant or tenants in tail male, or in tail, were dead without issue inheritable under the estate tail, or estates tail, then vested in possession, or in remainder, in the person or persons so refusing or neglecting : provided always, and I do hereby expressly declare my will and mind to be, that the clause hereinbefore contained for compelling the persons hereinbefore mentioned, to use the name and arms of H. shall not extend to any person or persons, who shall, under any will or other instrument whatsoever, made prior to the 1st day of January, —, be under any previous obligation of using any other family name, or bearing any other family arms. And I do hereby declare my will to be, that in such settlement shall be contained a power to enable the person or persons, who, for the time being, shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore directed to be conveyed and settled as aforesaid, for an estate of freehold, to grant, demise, limit, or appoint all and singular the said hereditaments, or any of them, or any part thereof, for any term or number of years, not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions, so nevertheless that no such lease of all or any part of the hereditaments, comprised in the said term of 2000 years, be made to commence prior to the 29th day of September, which will be in the year of our Lord ——. And I do hereby also direct, that in such settlement, so to be made as aforesaid, there be contained a power, enabling the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and sur-

Settlement  
to contain  
a power of  
leasing.

**No. 5.**  vivor of them, and the executors and administrators of such survivor, from time to time, to demise or lease all and singular the hereditaments comprised in the said term of 2000 years, or any of them, or any part or parts thereof, for any term or number of years in possession, determinable on or before the said 29th day of September, which will be in the said year of our Lord, at the most improved rents, without taking any fine, and under the same restrictions; and also a power to enable the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request, and by the direction of the person or persons who, for the time being, shall be entitled to the hereditaments, to be comprised in the settlement hereby directed to be made as aforesaid, for an estate of freehold, either in possession, or in remainder, immediately expectant upon the said several terms of 99 years, and 200 years respectively, signified by some writing under the hand and seal, or hands and seals of such person or persons, attested by two or more credible witnesses, to make sale of, or to convey in exchange for, or in lieu of other hereditaments, all or any of the hereditaments to be comprised in the settlement so to be made as aforesaid, the fee simple and inheritancce thereof, as well as for the said terms of 99 years, and 200 years respectively, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said Sir G. C., R. M., J. D., J. C. J., J. F., or the survivors or survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in

**Also a power to enable the trustees to sell or exchange.**

**And to purchase, with the money arising from such sale, other lands, and to settle the newly purchased lands, or such as are taken in exchange, to like uses.\***

Where the estate directed to be purchased cannot be had, other lands may be bought.

\* Where a will, directing money to be laid out in land, points to a particular estate, if that fails, it may be laid out in other lands, the particular direction being only a mode of executing the primary intention to purchase lands, 10 Vez. Jun. 618. This has been decidedly holden by the present Lord Chancellor, though Lord Thurlow used to differ with Lord Roslyn on this question,

the purchase of other freehold lands of inheritance, or of copyhold lands, convenient to be held with the lands to be comprised in such settlements as aforesaid, or any of them, or so to be purchased or taken in exchange, in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to such uses as the hereditaments, which shall be so sold or conveyed in exchange, stood settled, and limited respectively, immediately before such sale or exchange, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. Provided always, and I do hereby declare my will to be, that no manors, messuages, lands, tenements, or hereditaments, situate, lying, and being, in the parishes of —, and —, respectively, or any of them, shall be sold, aliened, or disposed of, except in exchange for, or in lieu of, hereditaments in the parishes of A. and B. in the said county of N. respectively, or one of them, and two pieces of ozier ground, or meadow, lying in the last-mentioned parishes, or one of them, or partly there, and partly in some other parish or parishes, abutting east, on a brook or rivulet that runs through the commons of — and —, and is there the boundary of the parish of G. against the said parishes of A. and B. And further, that no sale, alienation, or disposition as last mentioned, shall be made of the alternate right of presentation to the rectory of K. except for the

No. 5.

Limitations restricting the exercise of the last-mentioned power as to certain specific objects.

the latter lord being of the opinion to which Lord Eldon has since added the weight of his authority.

Whether money directed to be laid out in land, in a particular place, shall, if land cannot be procured there, be laid out elsewhere, has been left undecided by the present chancellor. Lord Rosslyn was of opinion it might, Lord Thurlow that it could not, see 10 Vez. Jun. 610. But as Lord Eldon held the affirmative on the other question, when it came before him a short time afterwards, a conjecture may be allowed as to the probable result, if his Lordship were now called upon to settle the point where the place, and not the estate, was particularised. See *Maynwarling v. Maynwarling*, 3 Atk. 414. *Oldham v. Hughes*, 2 Atk. 458.

Where the place, and not the estate is specified

**No. 5.**  


Other clauses to be inserted in the settlement as counsel shall advise, but to be conformable to the spirit of the will.

Trust of the term of 99 years, to raise an annuity for the person named.

actual exchange of, or for the alternate right of presentation to the rectory of A. in the said county of N. upon such terms as the said Sir G. C., R. M., J. D., J. C. J., and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall judge proper. And my will is, and I do hereby declare, that there shall likewise be inserted in the said settlement, all such further and other additional clauses, declarations, agreements, powers, and provisos, as the counsel of the said J. W. and Sir R. J. B., or the survivor of them, or the executor or administrator of such survivor shall advise to be proper or expedient, but conformable to the general spirit and intent of this my will. And I do hereby declare, that the said term of 99 years hereinbefore limited in use to them the said Sir G. C., R. M., and J. D. of and in the hereditaments and premises in N. as aforesaid, is so limited to them, and that they, the said Sir G. C., R. M., and J. D. and the survivors or survivor of them, and the executors and administrators of such survivor shall stand, and be possessed of, and interested in the same, and the hereditaments therein comprised, upon the trusts, and to and for the intents and purposes, and under and subject to the provisos hereinafter declared or expressed, of and concerning the same, that is to say, in trust by mortgage of the hereditaments comprised in the same term, or a competent part, or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by any of the said ways and means, or by any other such ways and means as to the said Sir G. C., R. M., and J. D., or the survivors or survivor of them, or the executors or administrators of such survivor shall seem meet, to levy and raise, by even and equal quarterly payments or portions, one annuity, or clear yearly sum of 400*l.* of lawful money of Great Britain, during the life of my said brother R. H. and for one year after his decease, free from all deductions or abatements whatsoever, and also all such sum and sums of money as shall be sufficient to pay and reimburse to the said trustees respectively, their respective executors and administrators, all costs, charges, losses, damages, and expenses, which they respectively shall or may sustain, expend, or be put unto, in, or about the levying or raising the said

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annuity, or yearly sum of 400*l.* or any part thereof, or in anywise relating thereto, and from time to time, by and out of the said annuity, or yearly sum of 400*l.* as the same shall be received, in the first place to make such allowances to my said brother R. H. as are now usually made to him, and to defray and pay the other charges and expences now usually incurred for his maintenance, together with such further additional sums as the said Sir G. C., R. M., and J. D., or the survivors or survivor of them, or the executors or administrators of such survivor may deem requisite or proper, for his additional comfort or convenience, and also all expenses attending the funeral of my said brother, and all just debts as may be owing by him, or on his account, at the time of his death, and from time to time to pay the residue of the said annuity or yearly sum of 400*l.* after answering all and every the purposes aforesaid, to the person or persons who shall, for the time being, be intitled to an immediate estate of freehold, of and in the hereditaments comprised in the said term of 99 years, expectant on the same term, or to the receipt of the rents, issues, and profits thereof, for his, her, or their own absolute use and benefit. Provided always, and I do hereby declare my will to be, that from and after the trusts and purposes by this my will declared or expressed, of or concerning the said term of 99 years, shall be fully performed and satisfied, or shall become unnecessary or incapable of being performed, or be otherwise discharged, the said term of 99 years, of and in the said hereditaments comprised therein, or so much thereof as shall not have been mortgaged for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes whatsoever. And I do hereby declare, that the said term of 2000 years hereinbefore limited in use to them, the said Sir G. C., C. M., J. D., J. C. J., and J. F., their executors and administrators as aforesaid, is so limited to them, and that they the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators, shall stand possessed of, and interested therein, upon the several trusts, and to and for the several intents and purposes. and with, under, and subject to the several powers, provisos, restrictions, and declarations following, that is to say, upon trust, that they, the said Sir G. C.,

*Proviso for  
cesser of  
the term  
when the  
trusts shall  
be fulfilled,*

*Trusts of  
the term of  
2000 years  
to aid the  
personal  
estate, if  
insufficient  
in paying  
the debts,  
charges,  
and legacies,  
and to  
defray the  
expence of  
keeping the  
premises  
comprised  
in the term in*

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repair; to pay the expences of renewals of renewable leases, and fines upon admittances to copyholds; to pay the expence of purchasing cottages and common rights, and of inclosure; a salary to the receiver of the rents of the estates comprised within the first term; to pay additional portions, and to satisfy such securities as shall have been given for the same; and to raise a sum by way of jointure for such woman as testator's younger son may marry; and to lay out the residue in the funds, to accumulate for 20 years of the term as a fund subject in the first place to satisfying the aforesaid trusts, and then to answer the aftermentioned objects.

R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do, by mortgage or sale of the hereditaments, and real estate, comprised in the said term, or a competent part, or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by cutting down timber, or other trees, so nevertheless that no timber or other trees be cut down without the consent in writing of the person or persons, for the time being, intituled to the next immediate estate of freehold of and in the said hereditaments comprised in the said term of 2000 years expectant on the said term, or by all or any of the said ways and means or by any other such ways and means as to the said Sir G. C., R. M., J. D., J. C. J., and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall seem meet, levy and raise such sum and sums of money as shall be sufficient to pay, and shall and do accordingly pay, after my personal estate not hereby specifically bequeathed shall be applied so far as the same shall extend, my funeral expences, and the expences of proving this my will, and the pecuniary legacies, (except the additional portions) and the annual sums for my younger children, hereinafter directed to be raised or paid and given, and all my bond, simple contract, and other debts, and the interest of such debts as carry interest, as the same shall become due, and all arrears thereof, and all the expences of keeping the said several premises comprised in the said term of 2000 years, in good order and repair, and the taxes, assessments, and out-goings in respect thereof payable by the landlord, and the expences of renewing from time to time the leases of my several leasehold estates hereinafter bequeathed until the whole beneficial interests therein respectively shall vest in any person or persons absolutely, (so nevertheless that no renewal shall be taken of the lease of the manors of S———, and the lands and tenements hereinafter mentioned to be holden by lease under the crown, without the consent of such person or persons as hereinafter mentioned) and also the expences of all admittances to copyhold estates under this my will, and the expences attending the purchase of any cottages, with the apurtenances and commonable rights within the parish of F.

aforesaid, which the said Sir G. C., R. M., J. D., J. C. J. and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall judge it expedient to purchase, so as the consideration-money for the whole of such purchases do not exceed the sum of —l. and so as the hereditaments so to be purchased be settled and assured to such uses, and upon, to, and for such trusts, intents and purposes, and with, under, and subject to such powers, provisos, limitations, and declarations, as at the respective times of such purchase or purchases being made, shall be subsisting or capable of taking effect as to the hereditaments and premises comprised in the said term of 2000 years, under or by virtue of this my will, or of the settlement hereinbefore directed to be made as aforesaid, and also all expences attending any inclosure of the common of F. and the planting thereof or otherwise improving the same; and the expences of my trustees and executors in the execution of this my will, and the trusts and powers herein contained, and a proper and sufficient salary or allowance to the person or persons who for the time being shall be employed in managing my estates comprised in the said term of 2000 years, and receiving the rents and profits thereof, and keeping books and accounts for my trustees for the time being, of all matters relating to this my will, and the trusts herein contained or expressed: and in the next place levy and raise, and pay such additional portions for my daughter L. and my said son E. as are hereinafter mentioned, when and as the same respectively shall become due and payable, and be called in and demanded, or discharge and satisfy such securities as may have been given for the same, and all mortgages which shall have been made for raising the same, and also such annual sum for or in the nature of a jointure for any woman with whom my said son E. shall happen to marry, as hereinafter is mentioned, and such sum in gross for the benefit of the younger sons and daughters of my said son E. as hereinafter is mentioned, and all such sum and sums of money as shall be sufficient to answer all and every the payments hereinafter directed to be made out of the money to arise or be received under or by virtue of the trusts of the said term of 2000 years; and shall and do accumulate from time to time



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for and during and unto the full end and term of 20 years, to commence and be computed from the time of my decease, so much of the rents, issues, and profits of the said hereditaments and premises comprised in the said term of 2000 years, as shall not be from time to time applied for some or one of the purposes aforesaid, according to the direction aforesaid, and lay out and invest the same from time to time in the names or name of them my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, in some of the public funds, and from time to time accumulate the dividends, interests, and proceed of such funds, or so much thereof as shall not be applied for some or one of the purposes aforesaid, and lay out and invest the same in like manner, and so in like manner accumulate the dividends, interests, and proceeds of such other funds, or so much thereof as shall not be applied as aforesaid, to the intent that in this manner a fund may be established for answering the purposes aforesaid, and also the purposes hereinafter mentioned, out of which fund I direct the same or such of them as shall from time to time remain unsatisfied and be capable of being carried into effect, to be answered and carried into effect. And my will is, and I do hereby direct and appoint that by and out of the said fund so to be established as aforesaid but not otherwise, after the several purposes aforesaid, or such of them as shall be capable of being carried into effect shall be satisfied, the trustees or trustee for the time being of the said term of 2000 years, hereby limited or created, shall pay off and discharge all mortgages, securities, and charges which shall have been made of or upon any of my estates in pursuance or by virtue of this my will, besides such mortgages as are hereinbefore directed to be paid, and in the next place shall pay off and discharge so far as the said fund shall extend, such mortgage or mortgages and securities as may then have been made in pursuance or by virtue of or under the said indenture of the — day of ———, or any part or parts thereof, for the purposes of raising all or any of the portions thereby directed to be raised, or any of them, or any part or parts of them, or of any of them; and in case the said last-mentioned portions or any part or parts thereof respectively, shall not have been so

Trustees  
out of the  
said fund  
to dis-  
charge  
mortgages  
upon any  
of the tes-  
tator's  
estates.

secured, then in trust to pay off and discharge such of the said portions or such part or parts thereof as shall not have been so secured. And I give and bequeath all my leasehold lands and tenements not hereinbefore bequeathed as aforesaid, nor included in any settlement made by me previous to the making of this my will, unto the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators, for all my term and terms, estate and interest therein respectively, in trust in the first place out of the rents and profits thereof, to pay the rents reserved and to be reserved by the respective leases under which the same are or shall be holden, and to perform and pay the expences of performing the covenants and agreements in such leases respectively contained on the lessees or tenants' parts, and to pay the taxes payable by the landlord in respect thereof, and to renew and pay the expences of renewing such leases from time to time, at the accustomed times of renewal, and subject thereto, to stand and be possessed and interested of and in the same respectively, upon such trusts, (2) and to and for

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Testator gives his leaseholds not before bequeathed to trustees, in the first place, out of the rents and profits, to pay the rents, the expences of performing the covenants, and of renewals, and subject thereto to stand possessed thereof upon trusts to correspond as nearly as may be

(2) By a limitation of leaseholds or mere personal chattels in strict settlement where the personal estate is either included in the same limitation as the freehold, or limited with reference to such limitations of the freeholds, the first tenant in tail that comes into esse, becomes absolutely entitled to the personal property, subject to the preceding particular estates therein, and this of course frequently produces a separation between the real and personal estate. See *Gregory v. Pelham*, 5 Bro. P. C. 435. and the *Duke of Bridgewater v. Egerton*, 2 Vez. 122. and *Duke of Marlborough v. Spencer*, 5 Bro. P. C. 592. But this vesting may be postponed by specific limitations to a more distant period, and the estate made to accompany still further the freehold estates. The settler may suspend the absolute vesting of the leasehold estates to any period not exceeding 21 years, after a life or lives in being. In reference to these modes of continuing the personal estate in the channel of the real estate, wills and settlements frequently vest the leasehold property in trustees, directing them to settle them according to the limitations of the freehold *as far as the law will allow*, or in terms of similar import. Lord Hardwicke treated these words as affording a ground for a court of equity, to model the limitations accord-

Of the effect of the clause directing leaseholds to be settled as far as the law will allow, upon trusts correspondent to the uses of the freehold.

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 with the  
 uses, trusts,  
 &c. before  
 declared  
 and limited  
 of and con-  
 cerning

such intents and purposes, and with, under, and subject to such powers, provisos, conditions, restrictions, limitations, and declarations, as will best and nearest correspond and agree with the uses, trusts, powers, provisos, conditions, restrictions, limitations, and declarations, hereinbefore limited, declared or expressed, of or concerning the hereditaments

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ingly; for he thought that this clause was to be considered as executory and directory, and that it was for that Court to direct such conveyance as would make the interests in both species of estates, correspond as far as by law was practicable, or in other words, as far as the settler or testator could himself have done; and it was plain he might have limited them to A. for life, remainder to his first son, and the heirs male of his body, and if such first son died before the age of 21, and without issue male, remainder over to his second son; he might have made the same limitations over to all the other sons, and in default of such issue, he might have limited the remainder over; and in case no son had lived to attain the age of 21, the remainder would have been clearly good. It was said by Lord Hardwicke, that that was the common and known way of conveyancing in settling chattels, and that where things were directed to go as heir-looms with an estate, or in case of a marriage settlement, or the like, so far as they could by law or equity, it was very proper it should be left to the court to settle the conveyance. See *Gower v. Grosvenor*, Barnardiston's Rep. in Ch. 54. and *Trafford v. Trafford*, 3 Atk. 347. But other cases have held that these words, "as far as the law will allow," do not necessarily import a desire that the chattels should be kept in the channel of succession as long as the ingenuity of conveyancers might contrive; but that they must be understood as being meant only to direct that estates may be taken in the personal property as nearly correspondent as the law allows, having respect to their different natures. And this was Lord Thurlow's opinion, in *Vaughan v. Burslem*, 3 Bro. C. C. 101. who there held that when the first son came into esse, he was absolutely entitled under such a directory clause; see *Foley v. Barnell*, 1 Bro. C. C. 274. It appears that Lord Eldon had considered the question as settled by the two cases of *Foley v. Barnell*, and *Vaughan v. Burslem*, for in the *Countess of Lincoln v. the Duke of Newcastle*, 12 Vez. Jun. 218. he said that if he had decided that cause originally he should have decided it according to *Vaughan v. Burslem*, as considering himself bound by that case,

hereinbefore devised and directed to be settled as aforesaid, (other than and except the said terms of 99 years, and 2000 years hereby limited, and the trusts thereof), but so as such leasehold premises be not considered as an interest vested in equity, in any person who would become entitled in equity to the whole interest therein, until such person shall attain

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the freehold property, (except the said terms of 99 and 2000 years)

and *Foley v. Barnell*, though he would confess he thought Lord Hardwicke's the better doctrine. He acquiesced in the opinion of the other Lords who modified the decree upon the principle laid down by Lord Hardwicke. In the said case of *Lady Lincoln v. the D. of N.* the tenant in tail having arrived at 21 before the cause came on upon the appeal, it was only necessary to determine that the leasehold estate should be assigned absolutely to him, and all the succeeding directions of the decree which had prospectively carried on the limitations upon the plan adverted to by Lord Hardwicke, in *Gower v. Grosvenor*, were left out, so that the decree, as it finally stood, affords no precedent for the form of the limitations to be adopted in order to carry into effect the directory clause above-mentioned. His Lordship said that according to his opinion, the best principle would be that the testator ought to be considered as furnishing the Court with all the means of enabling the party to tie up the property, not as long as the rules of law would admit, but to that convenient extent which would enable the Court to execute the general primary purpose of the will or settlement to carry together the real and personal estate. And that principle clearly was not executed by the manner in which it was proposed to be done by the decree in that case; for by Lord Hardwicke's method, and the method pursued in the decree, it was not to go over upon the simple contingency of the death under 21, but upon the event of the son's dying under that age and without issue. Now under this form of limitation the son might upon arriving at the age of 14, bequeath the estate subject to the contingency of his dying under 21, not leaving issue, and supposing he died intestate, under 21 leaving issue, that issue male would not take the leasehold as he would the real estate, but the leasehold would be part of his general personal estate, which might go to the next of kin and equally to the wife with them. And if the going over were made to depend upon the simple contingency of the dying under 21, without regard to issue, then if an infant son died, leaving issue, the real and personal es-

**No. 5.** the age of 21 years, yet so nevertheless as not to deprive such person during his, her or their minority, of the clear rents, issues, and profits thereof. And my will is, and I do hereby direct, that as soon as may be after my decease, a catalogue of all my books shall be taken, and an inventory made of all my plate, linen, china, pictures, prints, furniture, and household goods at ——— house, such inventory to be made by two or more persons used and accustomed to business of this kind, one of them to be named by my eldest son, and the other or others by the said Sir G. C., R. M., J. D., J. C. J., and J. F., or any two or more of them, and three copies at least of the said catalogue and inventory respectively, shall be made and signed by the persons taking the same respectively, one copy of which said catalogue and inventory respectively shall be delivered to my eldest son, one to my youngest son, and one to the said Sir G. C., R.

but so as not to be considered as vested in equity in any person who would become entitled in equity to the whole interest therein, until such person shall attain 21.

A catalogue of the books, and an inventory to be made of the plate, linen, china, pictures, prints, furniture, &c.

tates would be separated, the real going to such issue in tail, and the leasehold going to the next remainder-man. Lord Eldon, however, did not suggest any other mode; and I am not aware of any other or better now in use among conveyancers. The attempt is subject to great danger and difficulty. These rules and observations apply to all personal estates, chattels, and goods where they are directed to go along with and accompany the freehold uses and estates, as far as the law will allow. And where the will directs the trustees, as to certain specific articles, to settle the same so as that they shall go with, and be annexed to the property of the mansion house, and premises, as heir-looms, the principles above considered are equally applicable. But where the will is not directory of a settlement, but limits the chattel to go as an heir-loom, it seems the first tenant in tail who comes into esse, will take it absolutely; see the *Duke of Bridgewater v. Egerton*, 2 Vez. 121. 1 Bro. C. C. 280 (n.) *Gower v. Grosvenor*, Barn. Ch. R. 54. *Foley v. Barnell*, 1 Bro. C. C. 274. and *Vaughan v. Burslem*, 3 Bro. C. C. 101. And whether a testator without interposing trustees directs that the chattels shall go as heir-looms with his real estate, or gives the chattels to trustees without words directory of any settlement to be made by them, but simply in trust to permit them to go with the manor-house, or to be enjoyed by such person or persons as shall

M., J. D., J. C. J. and J. F., or one of them; such last-mentioned copy of the said catalogue and inventory to be kept and preserved, with the books, papers, and receipts, relating to the trust estate as aforesaid: and I direct that no articles whatever be removed from my said house until such catalogue and inventory shall be taken and signed. I bequeath to my dear wife all the furniture in the house at ———; I give and bequeath all my horses, and other cattle, and other my live stock, and all my farming and gardening implements and utensils, and also all wines, liquors, stores, and provisions, in or about my house at ———, aforesaid, to my said eldest son, absolutely; I give to my daughter L. the whole of the furniture belonging to and commonly used in her apartments in ——— house, and to my younger son all my books, plate, china, pictures, linen, household goods and furniture, in the chambers he now resides in or may reside in, or occupy at the time of my decease, and also [various specific bequests].

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One to be delivered to testator's eldest son E., one to the youngest son, and another to the trustees. No articles to be removed until such inventory and catalogue shall be made.

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be, from time to time, under the will entitled to it, for so long time as the rules of law and equity will permit, the consequence will be the same. See the case of Carr v. Lord Erroll, 14 Vez. Jun. 478.

## No. 6.

*A regular Settlement upon the Testator's Family.*

Limita-  
tions in  
strict set-  
tlement to  
testator's  
sons.

**THIS** is the last will and testament of me, J. B., &c. First, I give and devise all and singular my freehold manors, messuages, lands, tenements, hereditaments and real estates, whatsoever and wheresoever, together with their and every of their rights, members, and appurtenances, unto J. S. and S. J., their heirs and assigns for ever, to the several uses, upon and for the trusts, intents and purposes hereinafter limited, expressed and declared, of and concerning the same, (that is to say,) to the use of my eldest son, G. B. and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste, and from and immediately after the determination of that estate, by forfeiture or otherwise, in his life time, then to the use of the said J. S. and S. J. and their heirs, for and during the natural life of my said son, upon trust, to support and preserve the contingent uses and estates hereinafter limited, from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion may require; but nevertheless to permit my said son and his assigns during his life, to receive and take the rents, issues and profits of the said manors and other hereditaments, for his and their own use and benefit, and from and immediately after his decease, then to the use of the first son of the said G. B., lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing, and for default of such issue, then to the use of the second, third, fourth, and all and every other the son and sons of the said G. B., lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and

sons lawfully issuing, the elder of such sons and the heirs male of his body always to be preferred, and to take before the younger of such sons and the heirs male of his and their body and bodies ; and in default of such issue, then to the son of my second son, J. B., and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste, and from and immediately after the determination of these estates, by forfeiture or otherwise, in his life-time, then to the use of the said J. S. and S. J. and their heirs, for and during the natural life of the said J. B., upon trust, to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require ; but nevertheless to permit my said son J. B. and his assigns during his life, to receive and take the rents, issues and profits of the said manors and other hereditaments, for his and their own use and benefit, and from and immediately after the decease of the said J. B. then to the use of the first son of the said J. B., lawfully to be begotten, and of the heirs male of the body of such first son, lawfully issuing, and for default of such issue, then to the use of the second, third, fourth, and all and every other the son and sons of the said J. B., lawfully to be begotten, severally, successively and in remainder, one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body always to be preferred and to take before the younger of such sons, and the heirs male of his and their body and bodies, and in default of such issue, then to the use and behoof of my third, fourth, and all and every other my son and sons hereafter to be born, severally, successively, and in remainder, one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body always to be preferred and to take before the younger of such sons and the heirs male of his and their body and bodies, and for default of such issue, then to the use of all



## No. 6.

To the daughters, as tenants in common, with cross remainders.

Remainder to the heirs of testator's body; remainder to his wife for life; remainder to testator's right heir.

Leasing power.

Joining power.

and every my daughter and daughters, equally to be divided between or amongst them, if more than one, share and share alike, as tenants in common, and of the several and respective heirs of the body and bodies of such daughter and daughters lawfully issuing, and in case there shall be a failure of issue of the body or bodies of any of such daughters, then as to the share or shares (as well surviving or accruing as original) of such of them whose issue shall so fail, to the use and behoof of the survivors or survivor, and others or other of them, equally to be divided between or amongst such survivors and others (if more than one) share and share alike, as tenants in common, and of the several and respective heirs of the body and bodies of such surviving and other daughter or daughters lawfully issuing, and in case all my daughters but one shall die without issue, then to the use and behoof of such one daughter and the heirs of her body lawfully issuing, and in default of such issue, then to the use of the heirs of my body, and in default of such issue then to the use of my wife M. B. and her assigns for her life, and from and after her decease, to the use of my brother T. B. his heirs and assigns for ever. Provided always, and my will is that it shall be lawful for my said son G. B., during his life, and also for my said son J. B. during his life, in case he shall come into possession of my said estates, to demise and lease all or any part of my said estates hereinbefore devised unto any person or persons, for any term or number of years not exceeding 21 years in possession, at the best or most improved yearly rent or rents that can be reasonably gotten for the same, and without taking any thing by way of fine for or in respect of any such demise or lease, so that the lessee or lessees be not made dispunishable of waste by any express words therein, and do execute a counterpart thereof. Provided also, and my will further is, that it shall be lawful for my said sons, G. B. and J. B. severally and respectively, as and when they shall respectively be in the possession of my said manors, messuages, lands, tenements and hereditaments hereinbefore devised by any deed or deeds sealed and delivered in the presence of, and attested by two or more creditable witnesses, to grant, limit or appoint any annual sum

No. 6.

or yearly rent-charge not exceeding 500*l.* clear of all taxes and deductions whatsoever, to be issuing out of the said manors and other hereditaments hereinbefore devised, or any part thereof, to or for the use of any woman or women whom they may respectively marry, for the life or lives of such woman or women, by way of jointure, and in bar or without being in bar of dower, such grant, limitation or appointment to be made either before or after marriage, and with such powers and remedies of distress and entry and perception of the rents and profits of the said manors and other hereditaments, and such term or terms of years, for the better securing and compelling the payment of such annual sum or yearly rent-charge, as to them my said sons respectively shall seem meet. Provided also, and my will further is, that it shall be lawful for my said son G. B., by any deed or deeds, or by his last will and testament, or any codicil thereto duly executed and attested, to subject and charge my said manors and other hereditaments hereinbefore devised, or any part thereof, to and with the payment of any sum or sums of money, not exceeding the sum of 10,000*l.* for the portion or portions of any daughter or daughters, or younger son or sons of him the said G. B. (but so that the same be not made to vest in sons under the age of 21 years, or in daughters whilst under that age and unmarried) with such benefit of survivorship or accruer between or amongst them if more than one, and with such yearly sum or sums in the mean time, till such portion or portions shall become payable for maintenance and education, but not exceeding the interest of such portion or portions, at and after the rate of four pounds per cent. per annum; and also to limit such term or terms of years to trustees, for raising the same, and securing the payment thereof in the usual manner, as to him, the said G. B., shall seem meet. Provided also, and my will further is, that if my said son G. B., shall not charge my said manors, and other hereditaments, with the full sum of 10,000*l.* for the portions of his younger children, or if the full sum of 10,000*l.* shall not eventually become payable for such portions, then it shall be lawful for my said son, J. B., in case, and when he shall come into the possession of the same manors and

Power for the eldest son to raise portions for younger children.

Similar power to the second son to a restricted extent.

**No. 6.** hereditaments, by any deed or deeds, or by his last will and testament, or any codicil thereto, duly executed and attested, to subject and charge the same manors, and other hereditaments, or any part thereof, to and with the payment of any sum or sums of money, for the portion or portions of any daughter or daughters, or younger son or sons of him, the said J. B. not exceeding such a sum, as with what shall become payable for the portion or portions of the younger child or children of the said G. B. will make up the sum of 10,000*l.* or not exceeding the sum of 10,000*l.*, in case no sum at all shall become payable for the portion or portions of the younger child or children of the said G. B., (but so that the same be not made to vest in sons, under the age of 21 years, or in daughters, whilst under that age, and unmarried,) with such benefit of survivorship or accruer between or amongst them, if more than one, and with such yearly sum or sums in the mean time, till such portion or portions shall become payable, for maintenance and education, but not exceeding the interest of such portion or portions, after the rate aforesaid, and also to limit such term or terms of years to trustees, for raising the same, and securing the payment thereof, in the usual manner, as to him, the said J. B. shall seem meet. Also, I give and bequeath unto my said wife, M. B. for her own absolute use and benefit, all my linen, china, and household goods, and household furniture, of every kind and sort whatsoever (except plate). And also, all my liquors, coals, wood, and provisions of every kind, in or about my dwelling-house, or houses, at the time of my decease; and also, all the watches, rings, trinkets, and other ornaments of her person, usually worn by her, or called hers, together with all her wearing apparel, and paraphernalia whatsoever, save and except the jewels hereinafter otherwise disposed of; also, I give and bequeath unto my said wife, during her life, the use and enjoyment of all my plate, and of all the jewels she received on our marriage, of which I desire an inventory may be made and signed by her, after my decease, but recommending her to accommodate my said son G. B., or the person or persons for the time being, entitled to the possession of my estates, hereinbefore devised, in strict settlement under, or by virtue of the limitations hereinbefore contained,

Furniture, &c. (except plate,) provisions, ornaments of the person, (except jewels after disposed of,) to the wife, with directions to keep an inventory.

with the use of such part of the plate as she can conveniently spare, and he or they may have immediate occasion for; and from and after the decease of my said wife, I give and bequeath all my said plate and jewels unto the said J. S. and S. J., their executors and administrators, to whom I also bequeath the portraits of &c. immediately in trust for, and to permit the same respectively to be held and enjoyed by the person or persons, who shall, from time to time, be entitled to the possession of my said manors, and other hereditaments hereinbefore devised in strict settlement, and for such and the same estate and interest therein, to the intent that the same may go and be enjoyed, with such manors, and other hereditaments, as, or in, the nature of heir-looms as far as the law will permit; and in order thereto, my will is, that no person taking an estate tail, by purchase, in my said manors, and other hereditaments, or any part thereof, shall be intitled to such an absolute or vested interest in the said plate, jewels, and portraits, as would be transmissible to his or her executors or administrators, unless such person shall attain the age of 21 years, or die under that age, leaving issue inheritable under such intail, living at his or her decease. And it being my intention to make some alterations and improvements in and about my house at T., my will is, and I hereby direct, that if the same shall not be completed in my lifetime, then the same shall be completed and finished after my decease, in such manner as my executrix shall think proper and direct; and the charges and expences attending the same, shall be paid out of the rents and profits of my estates at ——— and ———, in the said county of ———, which I hereby authorise and empower my executrix to receive and take for that purpose. And my will is, that my wife, M. B., shall have the use and enjoyment for her own residence only, of my said house at T. with the stables, offices, and outbuildings, yards, gardens, lawns, plantations, and pleasure grounds thereunto belonging, and of the home close and meadow, at the bottom thereof, until my said son, G. B., or the person or persons for the time being entitled thereto, under the limitations hereinbefore contained, shall attain the age of 21 years. Also, I give and bequeath unto my said dear wife, if she shall be living, the right of presen-

No. 6.

Plate, jewels, and portraits to go as heir-looms.

Executors to finish the alterations and improvements intended to be made in and about the house at ———.

Testator's wife to have the use of the house for her residence till the eldest son attains 21.

And to have the right of

**No. 6.**

presenta-  
tion to the  
rectory of  
— dur-  
ing the mi-  
nority of  
the eldest  
son or the  
person en-  
titled for  
the time  
being to  
the advow-  
son.

A sum to  
be invest-  
ed in the  
funds, and  
dividends  
to be paid  
to the wife  
for life,  
and after  
her de-  
cease to  
fall into the  
residue.

All the re-  
sidue to be  
collected  
got in and  
converted  
into money  
and invest-  
ed in the  
funds, with  
power to  
vary and  
transpose,  
&c.

tation to the rectory of T., in case, and as often as the same shall become vacant, during the minority of my said son, G. B., or of the person or persons for the time being, entitled to the advowson thereof, under the devise and limitations hereinbefore contained; also, I give and bequeath unto the said J. S. and S. J. the principal sum of 2000*l.* or thereabouts, due to me on a promissory note from the late Lord B—; and in case the same shall be received by me in my life-time, then I give and bequeath to them the sum of 2000*l.* in lieu thereof, immediately after my decease, in trust to be by them laid out or invested in, or upon government or other public stocks or funds, or upon real securities, at interest, with full power to change such stocks, funds, and securities, and those which shall be substituted in lieu thereof, for others of the like kind, as often as shall be thought expedient, and upon trust to permit my said wife to receive and take the yearly dividends, interest, or produce of such stocks, funds, or securities, for her own use and benefit, during her life, and from and after her decease, my will is, that such stocks, funds, or securities, shall fall into, and go, and be considered as part of my residuary personal estate; and I give and bequeath all the rest, residue, and remainder of my monies, stocks, funds, and securities for money, goods, chattels, and personal estate and effects whatsoever, and wheresoever, not hereinbefore disposed of, and which shall remain after payment of my debts, and funeral, and testamentary expences, unto my said wife, and the aforesaid J. S. and S. J., their executors and administrators, upon trust, to call in and convert the same into money as soon as conveniently may be after my decease, and to lay out and invest the money so to be called in, and to arise from my said residuary personal estate, in or upon government, or other public stocks or funds, or upon real securities at interest, with full power and authority to sell, dispose of, alter, vary, and change, such stocks, funds, and securities, and those which may be substituted in lieu thereof, for others of the same, or the like nature, as often as shall be thought expedient; and upon trust, as to all and singular the stocks, funds, and securities, which shall, from time to time, constitute or form part of my residuary personal es-

tate, for all and every of my children living at my decease, and born in due time afterwards, (save and except my said son, G. B., or such other son as shall then be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement,) who being a son or sons, shall then have attained, or shall afterwards attain the age of twenty-one years, or being a daughter or daughters, shall then have attained, or shall afterwards attain the like age, or be married under that age, and for their respective executors and administrators, equally to be divided between or amongst them, if more than one, share and share alike, and if there shall be but one such child, who shall attain the age or time aforesaid, then as to the whole in trust for such one child, and his or her executors and administrators, and to transfer, assign, and make over the same accordingly, as soon as circumstances will permit; and upon further trust, until such stocks, funds, and securities shall become transferable or assignable as aforesaid, to pay, apply, and dispose of, the yearly dividends, interest, and produce of the presumptive share or shares for the time being, of the child or children, who shall not have attained the age or time aforesaid, of and in the said stocks, funds, and securities, for or towards the maintenance and education of such child or children respectively, until he she or they shall acquire a vested interest therein, or die, which shall first happen; and my will further is, that it shall be lawful for my said trustees, or the survivors or survivor of them, or his or her executors or administrators, at their, his, or her discretion, to apply and dispose of any part or parts, of the presumptive share or shares, for the time being, of any son or sons, under the age of 21 years, of and in the said stocks, funds, and securities, for placing him or them out in any profession, business, or employment, or for his or their instruction therein, or otherwise for his or their benefit or advancement in the world, notwithstanding such share or shares shall not then have become vested; and in case all my said children, except my said son G. B., or the son, who at my decease shall be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement, shall die, without any of them having acquired a vested interest in the said stocks

No. 6.

To apply the same for the benefit of the younger children.

To be equally divided.

With power to apply their presumptive shares for and towards their maintenance.

And for their advancement in the world.

And if all the children die except G. B., then the whole in trust for the eldest or other

## No. 6.

son entitled to the settled hereditaments to transfer the same to him when of age, and in the mean time to apply the dividends towards his maintenance, and if he shall die under age, in trust for the wife during life, and after her decease to testator's brother. The wife sole executrix and guardian.

Indemnity clause.

funds, and securities, then my will is, and I hereby direct, that my said trustees shall stand, and be possessed of all such stocks, funds, and securities (save and except such part thereof, if any, as may have been applied for the advancement of any younger son or sons, whilst under age as aforesaid,) in trust for him, my said son, G. B., or such other son as shall, at my decease, be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement; and to transfer, assign, and make over the same to him accordingly, at his age of 21 years, or as soon after as circumstances will permit, and in the mean time to apply the yearly dividends, interest, or produce, or any part thereof, for or towards his maintenance and education; and in case of his decease, under the age of 21 years, then upon trust for my said wife, M. B., for and during her life, and after her decease in trust for my said brother, T. B., his executors and administrators, for his and their own absolute use and benefit. I nominate and appoint my said wife, M. B., sole executrix of this my last will and testament; I also appoint her guardian of all such of my children as shall be infants, during their respective minorities; and I give and devise unto my said wife, and the said J. S., and S. J., and their heirs, the legal estate of all such messuages, lands, tenements and hereditaments, as are vested in me, in fee simple, or for any estate of freehold, by way of mortgage, or as a security for money, to the intent that they may be enabled to convey and dispose of the same, in such manner as occasion shall require; and my will is, and I hereby declare, that my said trustees and executors, or any of them, their, or any of their heirs, executors or administrators, shall not be charged, or chargeable with, or accountable for any more of the trust monies and premises, than they shall respectively actually receive, or shall come to their respective hands, by virtue of this my will, nor with, or for any loss which shall or may happen of the said trust monies and premises, or any part thereof, so as such loss happen without their wilful neglect or default; nor any of them, for the others, or other of them, or for the acts, deeds, receipts, disbursements, or defaults of the others, or other of them, but each of them, only for his or her own acts, deeds, receipts, disbursements, and defaults.

And also that it shall and may be lawful to and for them my said trustees and executors, and their respective executors and administrators, in the first place, by and out of the monies which shall come to their hands respectively by virtue of this my will, to deduct, retain to, and reimburse themselves respectively all such costs, charges, damages, and expences as they shall respectively pay, bear, sustain, expend, or be put unto, for or by reason or means of the trusts hereby in them reposed, or the management or execution thereof, or any act, transaction, matter or thing whatsoever in any wise relating thereto. And lastly, I hereby revoke all former wills by me at any time heretofore made.

In Witness, &c.

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No. 7.

*A Will with limitations of the real property to the children successively and their sons and daughters in fee with a variety of other provisions by way of annuity and otherwise.*

THIS is the last will and testament of me I. S. in the county of Northampton, Esquire. I desire that my body may be deposited in the vault wherein my late dear father was buried at ——— in the county of ———, with suitable decency, but without funeral pomp. And whereas I am seized of the fee simple and inheritance of the manor of N——— in the county of N——— aforesaid, and divers hereditaments purchased by me from ———, and also divers messuages, lands, and hereditaments in the parishes of ——— A. and B. in the counties of ———, H. and D. and purchased by me from D. C. esquire, and also of divers other messuages, lands, cottages, and hereditaments at S. in the said county of N. and lately purchased by me of C. D. and



No. 7. E. F., and also of a messuage or dwelling house and divers lands and hereditaments at V. in the county of Sussex purchased by me of F. T. esquire, and also of divers messuages lands and hereditaments at L—y in the parish of T. in the said county of S. and lately purchased by me of H. P. L. and his trustees. And whereas the said messuages, lands, and hereditaments at L—y are subject to the payment of the sum of 4100*l.* to L. T. S. and F. (the trustees named in an indenture of settlement bearing date, &c. being the settlement made on my marriage with my present wife M. S.) which sum was advanced by them for my use out of the trust monies of such settlement; now I give and devise my said manor and all other my freehold messuages, lands, tenements, hereditaments, and real estate whereof I have power to dispose in possession, reversion, remainder, or expectancy, (save and except the said messuage, lands, and hereditaments at V. hereinafter devised) with their and every of their rights, members, and appurtenances, subject nevertheless to such charges and incumbrances as the same premises or any of them shall be at the time of my decease subject or liable to, and subject also to the payment of the several annuities hereinafter bequeathed, to X. Y. Z. their heirs and assigns; to the uses, upon the trusts, and for the intents and purposes, and subject to the provisos and declarations hereinafter limited and contained concerning the same, that is to say; to the use of my eldest son W. S. if he shall attain the age of 21 years, or shall be married with the consent in writing of any three of the trustees for the time being of this my will which shall first happen and his assigns for the term of his natural life without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in his life time, to the use of the said X. Y. Z. and their heirs during the life of the said W. S., upon trust by the usual means to preserve the contingent remainders hereinafter limited from being destroyed; but nevertheless to permit my said son W. S. and his assigns during his life to receive and take the rents and profits of the same premises for his and their use, and from and immediately after the decease of the said W. S., to the use

Devise of  
freehold  
and copy-  
hold es-  
tates (ex-  
cept those  
at V.)

To his eld-  
est son W.  
S. for life  
and after  
his de-  
cease,

of such one son of my said son W. S. lawfully begotten who shall attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, as he my said son W. S. by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, to be signed and published by him in the presence of and attested by three or more credible witnesses shall direct and appoint, and the heirs and assigns of such son for ever; and in default of any such direction or appointment, to the use of the eldest of the sons (if more than one) of my said son W. S. who shall live to attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen and the heirs and assigns of such son for ever; but if there shall be only one such son who shall live to attain such age, or be married with such consent as aforesaid; then to the use of such only son his heirs and assigns. And in case my said son W. S. shall depart this life without leaving any son who shall live to attain the said age of 25 years, or be married with such consent as aforesaid, then to the use of my second son G. S. if he shall attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, and his assigns, for and during the term of his natural life without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in his life time, to the use of the said X. Y. Z. and their heirs, during the life of the said G. S., upon trust by the usual means to preserve the contingent remainders hereinafter limited from being destroyed, but nevertheless to permit the said G. S. and his assigns during his life to receive and take the rents and profits of the same premises for his and their use, and from and immediately after the decease of the said G. S. [like dispositions to other sons and the first of their sons who shall live to attain the age of 25 respectively.] And in case all my sons shall depart this life without leaving any son who shall live to attain the said age of 25 years, or be married with such consent as aforesaid, then to the use of the eldest of the sons of my daughter E. S. to be lawfully begotten (if more than one) who shall live to attain the age of 25 years, or be

No. 7.

To such one son of the said W. S. as he by deed or will shall appoint and the heirs and assigns of such son.

In default thereof to the eldest of his sons (if more than one) or an only son who shall attain 25, his heirs and assigns.

Like dispositions in favour of testator's other sons.

In default of children in the male line to the eldest of the sons of his daughter E. S. (if

No. 7.

more than  
one) or an  
only son  
who shall  
attain 25,  
his heirs  
and as-  
signs:

In de-  
fault, &c.  
to the eld-  
est of the  
sons of his  
daughter  
R. S. (if  
more than  
one) or an  
only son  
who shall  
attain 25,  
his heirs  
and as-  
signs,

Devise of  
copyholds  
to the same  
uses as the  
freehold,  
or as near  
thereto as  
the tenure  
will per-  
mit.

Directions  
that a lease  
of the es-  
tate pur-  
chased of  
D. C.  
shall be  
granted to  
L. K. for  
14 years  
if he shall

married with such consent as aforesaid, which shall first hap-  
pen, and the heirs and assigns of such son for ever; but if  
there shall be only one such son of my said daughter E. S.  
who shall live to attain such age or be married with such  
consent as aforesaid; then to the use of such one only son  
his heirs and assigns for ever; and in case my said daughter  
E. S. shall not have any son who shall live to attain the said  
age of 25 years or be married with such consent as aforesaid,  
then to the use of the eldest of the sons of my daughter R.  
S. to be lawfully begotten (if more than one) who shall live  
to attain the age of 25 years, or be married with such consent  
as aforesaid, which shall first happen, and the heirs and as-  
signs of such son for ever; but if there shall be only one such  
son of my said daughter R. S. who shall live to attain such age  
or be married with such consent as aforesaid, then to the  
use of such one only son his heirs and assigns for ever; and  
in case both my said daughters shall depart this life without  
leaving any son who shall become entitled to the said here-  
ditaments under and by virtue of this my will, then to the  
use of my right heirs. And I give and devise all my copyhold  
and customary messuages, lands, tenements, and heredita-  
ments (having duly surrendered the same to the use of my  
will) to the said X. Y. Z. their heirs and assigns, to hold  
the said copyhold and customary messuages, lands, tene-  
ments and hereditaments to and for the use of them, their  
heirs and assigns, upon such trusts, nevertheless, and to for  
with and subject to such uses, estates, intents, purposes, pow-  
ers and provisions as shall best correspond with the uses, es-  
tates, intents, purposes, powers and provisions hereinbefore  
expressed, given, limited and declared of and concerning my  
said freehold messuages, lands, tenements, hereditaments  
and premises, or as near thereto as the nature and quality  
of such copyhold and customary estate and tenure will admit  
of. And I further declare my will to be, that in case my  
faithful farming servant L. K. shall be living at my decease,  
that then and in such case the person who by virtue of the  
dispositions hereinbefore contained shall be beneficially en-  
titled to the possession whether for life or other greater es-  
tate of my said lands and hereditaments hereinbefore men-  
tioned to have been purchased of D. C. esquire, or in case

such person shall be a minor his guardian or guardians shall and do within one month after my decease in case the said L. K. shall request the same, by indenture or other effectual assurance in the law containing the usual covenants, grant and demise unto him the said L. K. the same last mentioned lands and hereditaments which are now in my occupation for the term of 14 years, in case he shall so long live and continue himself to occupy the same lands and hereditaments, such term to commence and be computed from one month or 28 days after the day of my decease; and my will is, and I direct in case the said L. K. shall be living at my decease, that the farming stock and implements of husbandry which shall be upon my said lands and hereditaments which I have hereinbefore directed to be demised to the said L. K. shall, if he shall request the same, be valued by two indifferent persons, one to be chosen by him and the other by the trustees hereinafter named concerning my residuary estate or the survivors or survivor of them his executors or administrators, but in case such two persons cannot agree in such valuation then by a third indifferent and competent person to be named by the same two persons so first appointed, and that the said L. K. shall have the privilege of purchasing the said farming stock and implements of husbandry for the sum at which the same shall be so valued, and that 1000*l.* part of such sum shall and may remain secured to be paid by him to the said trustees or trustee by his bond and by a judgment to be entered thereupon in pursuance of a warrant of attorney to be executed by him, such payment to be made at the expiration of seven years from the time of my decease with interest in the mean time on such sum at the rate of 4*l.* per cent. per annum by equal half yearly payments; but in case he shall happen to die before the expiration of the said term of seven years, or become insolvent or a bankrupt, my will is that the said sum of 1000*l.* with such interest as shall be then due thereon according to the rate aforesaid, shall become immediately payable out of, and charged and chargeable upon, the farming stock and implements of husbandry which shall be upon the said lands and hereditaments at the time of such his decease insolvency or bankruptcy. And I further direct that in such lease so to be made to the said L. K. may be contained a

No. 7.

so long live and continue to occupy it.

Testator directs that his farming stock shall be valued, and L. K. shall have the privilege of purchasing it at such valuation, and 1000*l.* thereof may remain for 7 years on the security of his bond, and a judgment, at interest; the same however, in the event of his death or insolvency before the expiration of such term, to become payable out of the stock which shall then be on the said lands.

**No. 7.** proviso for making the same void in the event of such insolvency or bankruptcy as aforesaid, and that the said bond and warrant of attorney may be so framed as that, in case of the death of the said L. K. before the said 1000<sup>l</sup>. and all interest shall be satisfied and paid, execution may immediately be taken out and had thereupon. I give and devise my messuage or dwelling house, and all those lands, tenements, hereditaments and premises situate and being at V. in the county of Sussex, and hereinbefore mentioned to have been purchased from F. T. esquire, with their and every of their rights, members, and appurtenances unto the said X. Y. Z. their heirs and assigns; to the uses upon the trusts and for the intents and purposes hereinafter expressed concerning the same, that is to say, to the use of the said X. Y. Z. and their heirs during the life of my wife the said M. S., in trust to permit my said wife to hold and enjoy the same during her life; but in case she shall not chuse to occupy the same, then in trust to pay the rents and profits thereof or of so much as she may not chuse to occupy, as the same shall accrue due and be received, unto such person and persons only, and for such intents and purposes only as my said wife by writing under her hand, notwithstanding any coverture, shall from time to time direct or appoint the same to be paid, and in default of and until such direction or appointment to pay the same, or so much whereof she shall from time to time make no such appointment, into her proper hands; and my will is that the receipts of my said wife under her hand, or the receipts of such person or persons as she shall appoint to receive the same as aforesaid, shall be the only effectual discharges for the same (notwithstanding any coverture) to the end that the same may be for her sole and separate use and disposal, and not subject to the debts, engagements, or controul of any person with whom she may be intermarried; and from and immediately after the decease of my said wife, upon trust that they the said X. Y. Z. or the survivors or survivor of them or the heirs or assigns of such survivor shall and do in the month of August next after her decease make sale and dispose of the said messuage or dwelling-house, lands, tenements, hereditaments, and premises situate at V. aforesaid, either together or in parcels, by public

Devise of  
the dwelling  
house  
and hereditaments  
at R—.

To trustees  
in trust for  
the use of  
testator's  
wife for  
her life, in  
case she  
may chuse  
to reside  
there, and  
otherwise  
to pay the  
rents to her  
for her life,  
for her separate use,  
and after  
her decease,

Upon trust  
to sell the  
same,

auction for the most money that can be reasonably obtained for the same. And I declare my will to be that the money which shall arise by such sale shall be considered as part of the residue of my personal estate hereinafter disposed of, and be applied accordingly, and that the receipt or receipts in writing for such money or any part or parts thereof signed by the said X. Y. Z. or the survivors or survivor of them or the heirs, executors or administrators of such survivor shall be a sufficient discharge or sufficient discharges to such purchaser or purchasers for his her and their purchase money or monies, or for so much of such money as in such receipt or receipts respectively shall be acknowledged or expressed to have been received; and that after such receipt or receipts shall have been so signed, the purchaser or purchasers of the said premises hereby made saleable or any part thereof to whom such receipt or receipts as aforesaid shall be given, shall not be obliged to see to the application or be answerable or accountable for the misapplication or nonapplication of his her or their purchase money or any part thereof. And whereas the said messuage or tenement wherein I formerly dwelt in the parish of — in the said county of — was by the indenture of settlement made previous to my marriage with my said wife M. S. settled for her benefit during her life in remainder expectant on my decease, and by virtue of the said settlement I am authorised to dispose of the said premises, subject nevertheless to the said life interest of my said wife either by my last will and testament or otherwise, now I do hereby ratify and confirm the said settlement in every respect, and, subject to the said estate and interest of my said wife, and in pursuance and exercise of the power and authority thereby reserved to me, and of every other power or authority enabling me in that behalf, I give, bequeath, direct, limit and appoint the said messuage, or tenement and premises comprised in the said settlement, and also all the estate and interest which I now possess, or to which I am entitled, of and in a certain leasehold dwelling house in the parish of — purchased by me of —, and also the leasehold messuage or tenement purchased by me from the executors of the late — esquire and adjoining to the

No. 7.

Declaration that the monies to arise by such sale shall be considered as part of the residue of his personal estate.

Receipts of trustees to be effectual discharges to purchasers.

Confirmation thereof and subject to the estate of the testator's wife.

Request of the premises therein comprised, and also of all other leasehold premises in —.

No. 7.

To trustees  
upon trust,To demise  
and ma-  
nage the  
same in the  
most ad-  
vantageous  
way, and to  
pay the  
clear rents  
to M. S.  
for her life,  
for her se-  
parate use.Bequest to  
testator's  
wife of the  
household

first-mentioned messuage and premises, all which said several hereinbefore mentioned leasehold messuages, or tenements and premises are partly in the occupation of myself and the said — and —, and are used by us in the trade or business of —, with their and every of their rights, members, and appurtenances, and also all other my leasehold premises in — aforesaid; and all my estate, interest, and terms of years therein respectively, unto the said X., Y., Z., their executors, administrators and assigns, upon the several trusts, for the intents and purposes, and subject to the several provisos and declarations hereinafter expressed, (that is to say) in trust that they the said X., Y., Z., or the survivors or survivor of them, his executors or administrators, shall and do let, demise and manage the same in such manner as they or he, with the consent of my said wife during her life, and afterwards at their or his discretion, shall deem most advantageous; and, after deducting the rent, taxes, repairs and other outgoings for or on account of my said leasehold messuage, or tenements and premises, do and shall pay the clear residue or surplus of the rents, issues and profits thereof respectively, as the same shall become due and payable, and be received, unto my said wife M. S. and her assigns, for and during the term of her natural life, or unto such person or persons as she shall from time to time, by writing under her hand, appoint to receive the same; to the end that the same may be for her sole and separate use and benefit, and not subject to the control, debts and engagements of any husband with whom she may intermarry; and my will is, that the receipts of my said wife, under her hand, notwithstanding any coverture, shall be the only effectual discharges for the same: and from and after the decease of my said wife, upon trust, to assign and transfer the said leasehold messuages, tenements and premises, with the appurtenances, unto the eldest of my said sons, who shall be living at the decease of my said wife, M., his executors, administrators and assigns, for the residue which shall be then unexpired, of the several terms of years for which the same respectively are held. I give and bequeath to my said wife M. S., all the household and other furniture, goods, chattels and effects, which shall be in and

about my said messuage, or dwelling-house and premises at V—, at the time of my decease; and also all such of my plate, linen, china, jewels and wearing apparel as are not hereinafter by me specifically disposed of; I also give and bequeath to my said wife M. S. the sum of 3000*l.* of lawful money of Great Britain, 500*l.*, part of which, I direct shall be paid to her within fourteen days after my decease, and the remaining 2,500*l.* within two months after my decease; I also give and bequeath to my said wife M. S., her executors and administrators, for her absolute use, my coach and a pair of my best coach horses at her election, together with all the harness, trappings and furniture belonging thereto. I give and bequeath all the household furniture and fixtures, in and about my said dwelling-house at S., and also all the wines, spirits, and other liquors which shall be in the cellars of my said last-mentioned dwelling-house, or elsewhere, at the time of my decease, unto such one of my sons or grandsons who shall become first entitled to an estate for life, or other estate in possession, in my said freehold and copyhold hereditaments hereinbefore first devised, under or by virtue of the limitations hereinbefore-mentioned, hereby directing and enjoining him to supply my dear wife with such parts thereof as she may require to stock the cellars of my said house at V. I give and bequeath to my nephew, T. S., son of my brother C. S., the silver —, &c. &c. As to my two silver bowls, and two pair of my silver candlesticks, one silver tea urn and one silver bread basket, I give the use thereof to my said wife, M. S., for the term of her life; and from and after her decease I give and bequeath the same as follows; (that is to say,) to &c. &c. I give to my brother, I. S., an annuity of 200*l.* of lawful money of Great Britain, to be paid to him during the term of his natural life, by equal quarterly payments, and the first quarterly payment thereof to be made at the expiration of three calendar months next after my decease, and I charge the residue of my personal estate with the payment thereof. Provided nevertheless, and my will is, that the said annuity shall be paid into his proper hands, from time to time, as the same shall become due, and that the receipts of my said brother only shall be good and sufficient discharges for the

No. 7.

and other furniture at V.

To the wife 3000*l.*; 500*l.* of which to be paid within 14 days after testator's decease.

And also the coach and a pair of the best coach horses, with the harness, &c.

Bequest to his son, W. S. of the household furniture in his dwelling house at S. and all wines and liquors, directing him to supply his mother with such quantities as may be necessary to furnish her cellars at V.

Sundry bequests of the articles of plate.

Bequest to J. S. of an annuity of 200*l.* during his life, to be unalienable.



No. 7.

payment thereof; and my will also is, and I declare that in case my said brother shall grant, bargain, sell, transfer, assign, alien, encumber, or in any manner dispose of, or anticipate the said annuity or any part thereof, the same annuity shall thenceforth immediately cease and be void to all intents and purposes, in such manner as if the same had not been mentioned in this my will, or as if my said brother were dead; Provided also, and I declare my will to be that in case my said brother shall become bankrupt, or take the benefit of any act of parliament to be made for the relief or discharge of insolvent debtors, that then and in either of the said cases, the said annuity shall cease and be at an end, unless or until my said brother, who shall so become bankrupt or take the benefit of such insolvent act, shall or may be entitled to, or shall be in a capacity to receive the said annuity for his own private use, notwithstanding such events, or either of them, may have happened; it being my intention that the said annuity shall be for the private use and benefit of my said brother, and not be in any manner transferable to or for the use of any other person or persons; and it is my will that the said annuity shall be paid to my said brother, notwithstanding he may be indebted to me or my estate in any manner, at the time of my decease, and that such debt shall not be set off against or deducted from the said annuity.

Nevertheless the same not to affect the sum of — hereinafter set apart for the separate use of the testator's wife. Executors 100*l.* each.

To the trustees such a principal sum as will purchase 100*l.* per annum in the funds, to be purchased in their names

Provided also, and I hereby declare my will to be that the said annuity shall be without prejudice to the said legacy of 5000*l.* which is hereinafter directed to be set apart for the benefit of my said wife. I give and bequeath (various pecuniary bequests;) I also give and bequeath to the said X., Y., Z., hereinafter appointed executors of this will, the sum of 100*l.* each, of like lawful money of Great Britain, as some compensation for the trouble they will have in the performance of the trusts, or otherwise in or about the execution of this my will. I give and bequeath to the said X., Y., Z., their executors, administrators and assigns, such a principal sum of money as will be sufficient to purchase at the then market price, a quantity of stock, in some or one of the public funds, the interest or dividends whereof shall amount to 100*l.* per annum, and I direct such principal sum to be invested in the purchase of such stock directly, or as

soon as conveniently may be after my decease, and to stand in their names, or in the names or name of the survivors or survivor of them, or the executors, administrators or assigns of such survivor, upon trust that they the said X., Y., Z., or the survivors or survivor of them, or the executors or administrators of such survivor do and shall, out of the interest and dividends of such stock, pay the annual sums hereinafter mentioned, to the several persons following (that is to say) to [here follow several small annuities]. And my will is, and I direct that the several annuities hereinbefore by me bequeathed and made payable out of the said 100*l.* per annum, to arise from the stock so purchased, shall be respectively paid by equal half yearly payments, and that the first of such payments shall commence and be made the next day on which the said interest and dividends shall be payable, or as near thereto as may be convenient, after the day of my decease. And further I declare my will to be that the said several annuities, hereinbefore respectively given to the said — and —, shall be paid to them respectively, or to such person or persons as they respectively shall, by writing under their respective hands, appoint to receive the same, to the end that the same annuities may be for their respective separate uses, and not subject to the controul, debts or engagements of the respective husbands with whom they may happen to be intermarried at the time of my decease, or at any time afterwards; and that the respective receipts of the said — and — for their said respective annuities, shall be the only sufficient discharges for the payment thereof respectively. I give and bequeath to —, the sum of 800*l.* of lawful money of Great Britain, to be paid when he shall have attained the age of 21 years, at which time only it shall become a vested interest; and I do direct that in the mean time the same shall be invested in some or one of the parliamentary stocks or funds, and the interest thereof applied towards his maintenance and education. I bequeath to such of my friends as my executors shall think proper, not exceeding — in number, a ring of the value of —. I give and bequeath to each of my servants who shall be living with me at the time of my decease, suitable mourning, at the discretion of my executors. And as to all the rest, resi-

No. 7.

and to be applied in payment of the following annuities, viz.

Direction that the annuities given to — and — should be for their separate uses.

The residue of his

## No. 7.

personal estate he bequeaths to trustees upon trust to sell and convert the same into money, and to invest such money in real or government securities, or in the public stocks, after paying thereout in the first place the said sum of ———l. mentioned to have been borrowed of the trustees of the settlement; and also all debts and funeral expences; and to be possessed thereof upon the trusts afterwards mentioned, viz. as to 4000l. sterling, part thereof, upon trust to pay the dividends thereof to the wife for her life, for her separate use.

due and remainder of my personal estate, I give and bequeath the same unto the said X., Y., Z., their executors, administrators and assigns, upon trust and to the intent and purpose that they the said X., Y., Z., or the survivor of them, or the executors or administrators of such survivor, shall and do sell and dispose of so much of the said residue of my personal estate as shall not consist of debts, and which shall not already be invested in real or government securities, for the best price that can be reasonably obtained for the same; and shall and do collect in such debts; and my will is, and I direct, that they, the said X., Y., Z., or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, by and out of the monies which shall arise thereby, pay unto the said trustees of my said settlement, the said sum of ———l. hereinbefore mentioned to have been advanced by them for my use, or so much thereof only (if any) as shall remain unpaid at the time of my decease, and do and shall place out and invest the residue of such monies, after paying thereout my debts, funeral, and testamentary charges and expences, and the legacies hereinbefore bequeathed, in or upon some of the parliamentary stocks or funds, or on real securities in England at interest, and do and shall vary, alter, or transpose such stocks, funds, or securities, for others of the like nature, when, and so often as it shall seem meet, and do and shall stand, and be possessed of, and interested in, the said principal monies, stocks, funds, and securities upon the trusts, and to and for the intents and purposes hereinafter declared or expressed, concerning the same, (that is to say) as to and concerning the sum of 6000l. sterling money, part thereof, or the stocks, funds, or securities, in or upon which so much of the said monies shall be invested, upon trust that they, the said X., Y., Z., or the survivors or survivor of them, his executors or administrators shall and do pay, apply, and dispose of the interest, dividends, and yearly proceeds thereof, unto such person or persons only, and for such intents and purposes only, as my said wife, M. S. shall, from time to time, direct or, appoint, by writing under her hand, notwithstanding any coverture she may be under, and in default of, and until such direction or appointment, shall and do pay

the same, or so much, whereof she shall, from time to time make no such appointment into her proper hands, for her sole and separate use and benefit, during the term of her natural life, independent of the controul, debts, or engagements of any husband with whom she may intermarry; and my will is that her receipt or receipts under her hand, notwithstanding any such coverture, shall be the only sufficient discharge and discharges for the payment thereof: and from and after the decease of my said wife, upon trust, that they, the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor shall and do pay, transfer, or assign the same unto such of my children by my said wife, M. S., whether born in my life-time, or in due time after my decease, in such shares and proportions, (or the whole to an only child,) and for such estate and interest, and in such manner and form, and payable or transferable at such time or times, and subject to such limitations and directions as are hereinafter mentioned, expressed, and declared of and concerning the residue of such principal monies, stocks, funds, and securities; and as to and concerning the residue of the said principal monies, stocks, funds, and securities upon trust, that they, the said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do pay, transfer, or assign the same unto, and amongst all and every my child and children by the said M. S. my wife, whether born in my life-time, or in due time after my decease, if but one, the whole to such one child, but if more than one, then the same to be divided and distributed between and amongst them, in the proportions and manner following, that is to say, to each of my daughters a proportion of one eighth part of such residue of the said principal monies, stocks, funds, and securities, and the residue and remainder thereof, between and amongst my sons, in equal shares and proportions, share and share alike, the share and shares of such of them as being a son or sons shall have attained the age of 21 years, or being a daughter or daughters, shall have attained that age, or shall have been married in my life-time, with my consent, to be assigned and transferred to him, her, or them respectively, as soon as conveniently may be after my decease, and the

No. 7.

Upon trust to be applied in the same manner as is afterwards directed, concerning the residue thereof, viz.

As to the residue of such monies and funds; upon trust to assign the same to and amongst all the children of testator by the said M. S., in the proportions following, viz. to each of the daughters one 8th part, remainder to be equally divided amongst the sons; and to be assigned to sons at 21, and daugh-

## No. 7.

or marriage, if those events shall happen after his decease; but otherwise as soon as convenient after his decease.

In case any of the children shall be dead before attaining 21, (or being married, if daughters) the shares of those so dying, to accrue to the survivors.

Power for the trustees to advance 1-third of the children's expectant shares for their respective maintenance, and otherwise for their benefit.

share or shares of such of them as being a son or sons shall be then under the age of 21 years, to him or them respectively, upon his or their respectively attaining such age, and the share or shares of such of them as being a daughter or daughters shall be then under the age of 21 years; and shall not have been married with such consent as aforesaid, upon her or their attaining the said age, or as soon after as circumstances will permit, the same to be considered as a vested and transmissible interest, or vested and transmissible interests in such son or sons, upon his and their attaining the age of 21 years, and in such daughter or daughters, upon her or their attaining that age, or being married as aforesaid. And if any such child or children, being a son or sons, shall depart this life under the age of 21 years, or being a daughter or daughters, shall depart this life under that age, and without having been married with such consent as aforesaid, then all and every the share and shares of him, her, or them respectively, so dying, shall accrue, and go to the survivors or survivor, or others, or other of my said children, as is hereinbefore directed with respect to their original shares, if more than one, and the same respectively shall become vested and payable, or transferable at such ages, days, and times, as their, his, or her original share or shares shall respectively become vested and payable, or transferable, as aforesaid, and shall, together with the original share or shares, until such ages, days, and times respectively, be subject to a similar chance and condition of accruer and survivorship. Provided also, and my will and meaning is, and I do hereby further declare, that it shall and may be lawful to and for the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, at any time after my decease, with the consent in writing of my said wife, M. S., in case she shall be then living, and afterwards at and by their or his own discretion and authority, to pay and apply any part of the rents and profits of my estates, but without prejudice to the provision hereinbefore made for my said wife, or any of the annuities or legacies hereinbefore granted and bequeathed, and of the said residue of the said trust monies, stocks, funds, or securities, in placing of any of my said

No. 7.

children in any profession, trade, business, or employment, or for his, her, or their maintenance or education, or reasonable advancement and preferment in the world, or for or upon any other just or necessary occasion, notwithstanding his, her, or their estate, interest, share, or respective shares, shall not then have become vested, due, or payable, not exceeding a third of the amount of his or her presumptive or expectant interest or share, under this my will.

Provided also, and I do hereby declare, that my said wife, M. S., shall, (whilst she shall think fit, and continue unmarried,) have the care, management, and bringing up of my sons during their respective minorities, or of my daughters during their minorities, or until they shall be married with such consent and approbation as aforesaid, and for that purpose, that she, my said wife, shall have, receive, and be allowed such yearly sum or allowance out of the interest and dividends of such children's expectant shares of the said trust monies, as they, my said trustees, or the survivors or survivor of them, their, or his executors, administrators, or assigns shall, in their or his discretion, think fit or sufficient, any thing herein contained to the contrary thereof in any wise notwithstanding; and upon this further trust, that in case there shall not be any child or children of my body by the said M. S., living at my death, or there being such child or children, they shall all be dead before any of the said shares shall have become vested by virtue of the above dispositions, or any of them, then, and in such case, I do hereby will and direct that they, the said trustees, or the survivors or survivor of them, their, or his executors or administrators shall and do stand possessed and interested of and in the said residue of the said principal monies, stocks, funds, and securities, (subject to the trusts aforesaid, or such of them as shall then be unexecuted, and capable of being carried into execution,) in trust to raise and pay thereout to each and every of the children of my brother, J. S., who shall then be living, the sum of 500*l.* of lawful money of Great Britain, and as to the remainder of such residue of the said trust monies, stocks, funds, and securities, in trust for the only benefit of my brothers, ———, and ———, their

Proviso that testator's wife, whilst unmarried, shall have the care of the children, during their minorities, and have a competent allowance out of the dividends for that purpose.

In case of none such children living to become entitled, then,

Upon trust to pay to each of his brother, J. S.'s children the sum of 500*l.* and to assign the residue unto his surviving brothers, in equal shares.

### No. 7.

In case any of his brothers shall die without becoming entitled to such shares that then the shares of those so dying shall go to their children.

That the provisions hereby made for the benefit of Mrs. —, are in lieu of all dower, and other claims out of his estate and property, and for her sole and separate use.

respective executors and administrators, and to be assigned and transferred to between and amongst them in equal shares, share and share alike. Provided nevertheless, and my will is, and I do hereby declare, that in case any of them, my said brothers, shall depart this life before such last event shall happen, leaving any child or children of his body him surviving, who shall be then living, then and in such case the child or children of such of them, my said brothers, so dying, shall thereupon become entitled to such part or share of the residue of the said trust monies, stocks, funds, securities and premises, as the parent or parents of such child or children respectively, would have been intitled to have received under, or by virtue of the trusts aforesaid, in case he had been then living. And my will also is, and I do direct, that in case any, or either of them, my said brothers, shall be dead at the time of such decease and failure of the last of my issue, without leaving any such child or children of his body him surviving, who shall be then living, that then, and in such case, the part or share, and parts or shares of him or them so dying, shall go, accrue, and belong unto the survivors or survivor, and others or other of them, my said brothers, and shall be equally divided between or amongst them, if more than one, share and share alike, and if but one, then the whole of the residue to such one survivor, his executors, administrators and assigns absolutely; any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. Provided always, and I do hereby declare, that the provisions hereby made to or in trust for my said wife, are so made in lieu of, and in full satisfaction for her dower, thirds, and all other claims of, in, to, upon, or out of all or any of my estates or property. And I do further declare, that such provisions are so made and intended for her own sole and separate use, benefit, and disposal, and that the same, or any part thereof, shall in no wise be subject to the controul, debts, engagements, or incumbrances of any future husband of her, my said wife, and that her receipts, notwithstanding her future coverture, shall be sufficient discharges for the same. Provided also, and I do hereby likewise declare, that such pro-

visions are also made on the express condition that she, my said wife, shall, within one month from the time of my decease, acquit, release, and discharge my said executors, and my estate, of and from all arrears of interest, dividends and profits, which may have accrued due in my life-time, on the sum of ——. I. the interests dividends and profits whereof are settled to her separate use, by our settlement made previous to our marriage, or the interests and dividends of the funds in which the same, or the produce thereof, may have been invested, and all claims and demands in respect thereof, which said trust monies were sometime past invested by the said trustees, under the said settlement, together with other monies of my own, in the purchase of, &c: Provided always, and my will and meaning is, and I do hereby declare, that it shall and may be lawful to and for the said trustees and the survivors and survivor of them, his executors and administrators, in the mean time, from and after my decease, and until the trusts hereinbefore declared of and concerning the said trust monies, stocks, funds, securities and premises, shall be fully executed and performed, with the consent of my said wife, M. S., during her life, to be testified in writing, under her hand, and from and after her decease, then by and of the proper authority of them, the said trustees, or the survivors or survivor of them, his executors or administrators, to sell and dispose of all or any of the stocks, funds, or securities, in or upon which all, or any part of the said trust monies shall be invested, and also with such consent testified as aforesaid, or by and of such proper authority as aforesaid, as the case shall happen, to lend, and place out the monies to arise by or from such sale or disposition, or any part thereof, in or upon any other of the public or parliamentary stocks or funds, or upon real or government securities, or to deposit the same for safe custody in the Bank of England, but subject to, and so as not in any manner to affect or prejudice the trusts aforesaid, or any of them, and so from time to time to alter, change, or call in all or any such last mentioned stocks, funds, or securities, as often as they shall think fit, with such consent testified as aforesaid, or by and of such proper authority to be exercised in such event as aforesaid,

Power for  
the trustees  
to vary  
and alter  
the securities.



## No. 7.

Power to grant leases of the freeholds, and of the copyholds, with licence for any term, not exceeding 21, so as the most improved rent be reserved without taking any fine, &c.

Power for the appointment of new trustees.

subject, and without prejudice as aforesaid. Provided always, and I hereby declare my will to be, that it shall and may be lawful to and for the person or persons who, by virtue of the dispositions hereinbefore contained, or any of them, shall be in the actual possession of the said messuages, lands, and hereditaments, from and after he or they shall have attained the age of 21 years, and in the mean time, until he or they shall have attained that age, then for his or their guardian or guardians, by indenture or indentures, to be by him or them respectively duly executed, under his or their hand and seal, or respective hands and seals, to demise, lease, and grant all or any part of the said freehold premises, and by indenture, surrender, or otherwise to lease such of the said premises as are of copyhold or customary tenure, (so far as the licence of the lord or lords of the manor or manors, whereof the same respectively is or are parcel, or held, can be obtained for that purpose, or the custom of such manor or manors will respectively admit of,) unto any person or persons, for any term or number of years, not exceeding 21 years from the making thereof, so as there be reserved upon every such lease the best and most improved yearly rent or rents that can be reasonably obtained for the premises thereby leased, without taking any fine, premium, foregift, or forfeiture, for making the same, or any of them, and so as in every such lease there be contained a clause of re-entry for the non-payment of the rent or rents, thereby reserved, and so as the lessee in every such lease shall and do execute a counterpart thereof. Provided always, and I do hereby direct and declare, that if the said trustees or any of them, or any future trustees or trustee, under, or for the purposes of this my will, shall die, or desire to be discharged from, or shall refuse to act, or become incapable of acting in the trusts of this my will, at any time or times, before such trusts shall be fully performed and executed, it shall be lawful for the trustees or trustee for the time being, with the consent and approbation of the person or persons, for the time being, in the actual possession or receipt of, or immediately interested in, and entitled to the rents and profits of the said hereditaments and premises hereinbe-

fore devised and bequeathed, signified in writing, under his or their hand or hands, or in case the person or persons so interested and entitled, shall be a minor or minors, then with the consent and approbation of his, her, or their guardian, or guardians, signified in like manner, to nominate and appoint any other fit person or persons to be a trustee or trustees in the place and stead of him or them respectively, so dying, or desiring to be discharged from, or refusing to act, or becoming incapable of acting in the said trusts, and so in like manner, from time to time, as often as there shall be occasion, upon the death of any succeeding or future trustee or trustees, or his or their desire to be discharged from or refusing to act, or becoming incapable of acting in the said trusts; and that when and so often as any such new trustee or trustees shall be so nominated or appointed as aforesaid, the old trustee or trustees shall convey and assign the trust estates, and premises then in him or them vested, for all his or their estate and interest therein, so and in such manner as that the same may become, and be legally and effectually vested in the surviving or continuing trustees or trustee, and such new trustee or trustees jointly, or in such new trustee, or trustees, only, as the case shall happen, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisos, declarations, and directions hereinbefore declared or expressed of or concerning the same, or such of them as shall be then subsisting, or capable of taking effect, and such new trustee or trustees shall and may act in the execution of the said trusts in such and the same manner, to all intents and purposes, and shall be invested with, and have such and the like powers and authorities, as if he or they had been originally named a trustee or trustees for such purposes by this my will. And I hereby nominate and appoint the said X., Y., Z., executors of this my will. And I also appoint them, and also my said wife (so long as she shall remain unmarried,) guardians of the persons and estates of my children during their minorities. And I direct and declare that the said X., Y., Z., or any of them, or any new trustee or trustees, who shall be nominated and appointed as aforesaid, or the heirs, executors or administrators of either or

No. 7.

Appoint-  
ment of  
executors  
and guar-  
dians of  
the child-  
ren.  
Usual  
clause for  
indemnify-  
ing the  
trustees.

**No. 8.** any of them, shall not be answerable or accountable by virtue of, or under the trusts hereby reposed, or in pursuance hereof to be reposed in them respectively, any otherwise than each person, for his own actual receipts, acts, neglects and wilful defaults; and that they, or either or any of them, shall and may, by or out of any monies which shall come to their hands respectively by virtue of this my will, defray and retain to and reimburse themselves and each other, all such costs, charges and expences as they respectively shall or may incur, pay or sustain, in or about the execution, or by means of the trusts hereby in them reposed; and I hereby revoke all former wills and codicils thereto by me made at any time heretofore, and declare this only to be my last will, as expressed and contained in this and the six preceding sheets of paper hereto annexed.

Revocation of all former wills.

In witness, &c.

### No. 8.

*Will consisting exclusively of Provisions for Wife and younger Children, by annuity, and portions charged upon all the Testator's property.*

Testator gives his house at — after his wife's death, and all other his freehold, leasehold, and copyhold, immediately on his

**THIS** is the last will and testament of me, J. H., of, &c. I give and devise all that my freehold messuage or dwelling-house, known by the name of S —, and all my estate and lands thereunto belonging or therewith occupied, situate at —, unto my said wife, for and during the term of her natural life; and from and immediately after her decease I give and devise my said messuage or dwelling-house, estate and lands at —, and from and immediately after my

decease, I give and devise all other my freehold and all my copyhold or customary and leasehold messuages, lands, tenements and hereditaments whatsoever and wheresoever, and all my equitable and other estate and interest in the contracts which I have entered into for the purchase of land-tax charged upon and payable for my said estate; and also all shares and promissory notes, in or from the Grand Junction Canal navigation, of which I shall be possessed at my death; and all the share or shares, estate and interest which I have of and in the trade or business of —, which I now carry on in partnership with — and —, and all my books, pictures, plate, linen, china, household goods and household furniture of every kind which shall be in or about both my dwelling-houses, the usual places of my residence in town and country, at the time of my decease; and also all my stocks, monies, securities for money, and all other my personal estate not hereinbefore disposed of, unto and to the use of my said son, J. H., T. O., and W. R., their heirs, executors, administrators and assigns respectively, for all such estate, term and interest as I shall have therein respectively, at my decease, and according to the several natures and qualities of such estates and property respectively, upon the trusts hereinafter mentioned, expressed and declared of and concerning the same, (that is to say,) as for and concerning the books, pictures, plate, linen, china, household goods, and household furniture of every kind, which shall be in both my said dwelling-houses, the usual places of my residence in town and country, at the time of my decease, upon trust, from and after my decease, to allow my said wife to have and enjoy the use thereof during her life, for her own absolute benefit, without any controul whatsoever; and my will is, and I do hereby order and direct that as soon as conveniently may be after my decease, my said trustees do cause a true and exact inventory to be made and taken of all the said books, pictures, plate, linen, china, household goods and household furniture, and two copies to be made of such inventory, one to be delivered to my said wife, and the other to be kept by my said trustees, which last copy shall be signed by my said wife, at the foot of a receipt

No. 8.

decease, his contracts for land-tax, and canal shares, partnership share in his business of a— books, pictures, plate, linen, china, household goods, and also his stocks, money, securities for money, and all other his personal estate to his trustees upon trust,

to allow his wife to have the use of the books, furniture, &c. for her life, with directions for an inventory.

**No. 8.**  


Trustees  
out of the  
devised  
premises to  
raise 8000*l.*  
for child-  
ren's por-  
tions (ex-  
cept the  
eldest son).


thereunder written, for the articles therein specified, at or before the time of her taking possession thereof; and I declare and direct that my said sons, J. H., T. O., and W. R., their heirs, executors, administrators and assigns shall stand and be seised and possessed of and interested in my said estate at ———, and the said books, pictures, plate, linen, china, household goods and household furniture, subject to the life estate and interest of my said wife therein, and all other my said freehold, copyhold and leasehold estates, shares and notes in the Grand Junction Canal navigation, and personal estate whatsoever hereinbefore devised and bequeathed to them upon trust, by and out of the rents and annual income of my said freehold, copyhold and leasehold estates, or by mortgage and sale thereof, or of any part thereof, or by all or any of the same means, or by and out of the annual produce of my said personal estate, or by sale or other disposition thereof, or of any part thereof, or by such other ways and means as they shall think fit and advisable, to raise and levy the sum of 8000*l.* for the benefit and for the portions of all and every my child and children, living at my decease, or born afterwards (other than and except my eldest son the said J. H.) equally to be divided between and amongst, or for the benefit of them, if more than one, share and share alike, and if there shall be but one such child, then for the benefit of such only child, and to be raised and paid to or for such children or child, in the manner following, (that is to say) the share or respective shares of such of them, as being a daughter or daughters, shall be under the age of 21 years, and unmarried at the time of my decease, to be raised and paid as and when she or they shall respectively attain that age or marry with the consent of, &c. hereinafter named, which shall first happen and to be paid or invested in manner hereinafter mentioned, to the intent that the income thereof may be for the sole and separate use of such daughter or daughters, and may not be subject to the debts, control or engagements of any person, with whom she or they may, after my decease, happen to intermarry, and that the principal may be subject to the respective testamentary appointments, as hereinafter is men-

tioned; and the share or respective shares of such of them respectively, as being a son or sons, shall be under the age of 21 years, at my decease, to be raised and paid as and when he or they respectively shall attain that age; unless such time or respective times of marriage or attaining such age shall happen in my life-time, and in such case the share or shares of such of them as being a daughter or daughters shall attain the age of 21 years, or marry during my life-time; or being a son or sons, shall attain the age of 21 years, during my life, shall be as a vested interest for his, her, or their benefit respectively, upon my decease, and be raised and payable in manner aforesaid, at the end of six calendar months next after my decease, with interest thereon from my decease, until actual payment thereof; and if any such child or children, being a daughter or daughters, shall die under the age of 21 years, and without having been married, or being a son or sons, shall die under that age, then, as well the original as every other share which he, she or they, so dying, shall have taken by way of survivorship or accruer, shall go and be raised and paid and payable to or for the benefit of the survivor and survivors, and others or other of them, together with my eldest son, at such time or times as his, her or their original share or shares shall become payable, or as soon afterwards as circumstances will permit, but so that in making such division of all such surviving or accruing shares, my eldest son and his executors or administrators shall be included, and shall have and be entitled to one equal share and proportion therein with the other children or their respective executors or administrators; and it is my will and mind, and I do hereby declare that all and every the share or shares so directed to survive and accrue, shall from time to time survive and accrue, together with the original share and shares, until such original share or shares shall, by virtue of this my will become payable; and in case there shall be no such child or children, who, being a daughter or daughters, shall live to attain the age of 21 years, or be married, or being a younger son or sons shall attain the age of 21 years, then my will and mind is, and I do hereby direct that the said sum of 8000*l.* or any

No. 8.

Clause of survivorship including the eldest son.

If children all die before the vesting of their shares, money not to be raised.

**No. 8.**  part thereof, shall not be raised, and that the said trusts hereinbefore contained in that behalf shall cease and determine, and all and every part of my real and personal estate, be as fully and effectually discharged therefrom as if the same trusts had never been declared. And subject to the several trusts hereinbefore declared, I direct that my said sons, J. H., T. O. and W. R., their heirs, executors, administrators and assigns shall stand seised and be possessed of and interested in my said real estate, and my said residuary personal estate, upon trust, by and out of the rents, issues and annual produce thereof, or by mortgage, sale, or other disposition thereof, or of any part thereof, or by all or any of the same means, or by such other way and means as they shall think fit and most advisable, to raise and levy yearly and every year one annuity or yearly sum of 365*l.* free from taxes, and clear of all other deductions whatsoever, and pay the same into the proper hands of my said wife, or into the hands of such person or persons as she, by any note or writing under her hand shall, from time to time, but not by way of anticipation, charge or assignment, appoint to receive the same during her life, to the intent that the same may be for the sole and separate use of my said wife, and may not be subject to the debts, control, disposition or engagement of any person with whom she may happen to intermarry, the same annuity to be paid and payable by four equal quarterly payments, on four days or times in every year, the first quarterly payment thereof to begin and be made at the end of three calendar months next after my decease. And upon further trust, that they my said trustees respectively do and shall by all or any of the ways and means aforesaid, raise, levy and pay to the executors or administrators of my said wife, a proportionable part of the said annuity of 365*l.* calculated to the day of the decease of my said wife, for and in respect of the incurring quarter of a year, wherein she my said wife may happen to die. And I further direct that the receipt or receipts of my said wife, or of her appointee or appointees, and her or their receipt or receipts only shall be a good and sufficient discharge, or discharges, to the person or persons paying the said annuity, for so much thereof as in such

Annuity to  
the wife.

receipt or receipts shall be acknowledged or expressed to be received; and subject to the trusts hereinbefore declared for my said wife's benefit during her life, and subject to the payment of the said sum of 8000*l.* thereinbefore directed to be raised for portions for my younger children, and to every estate, trust, and interest hereinbefore mentioned, and all powers, provisos, and directions in this my will contained respecting my said real estate, and my said residuary personal estate, I declare and direct that my said son J. H., T. O. and W. R. their heirs, executors, administrators and assigns respectively shall stand seised, and be possessed of, and interested in all my said real and all my said residuary personal estate whatsoever in trust to pay to, or permit and suffer, or well and sufficiently to authorise and empower my said son J. H. and his assigns to receive and take the interest dividends and annual produce, and the rents, issues, and annual income of the same real and personal estate for and during the term of his natural life and from and after his decease, in trust for all and every or such one or more of the children of my said son J. H. lawfully to be begotten, whether born in his lifetime or after his decease at such time or times and in such parts shares and proportions, and subject to such conditions, restrictions and limitations over to or for the benefit of all or any of such children as he my said son J. H. from time to time by any deed or deeds writing or writings with or without power of revocation to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses or by his last will and testament in writing, or any codicil or codicils thereto, or any writing purporting to be his last will and testament or codicil to be signed and published by him in the presence of and to be attested by three credible witnesses, shall direct or appoint; and in default of and in the mean time and until such direction or appointment shall be made, and as to so much and such part or parts thereof, whereof no such direction or appointment shall happen to be made, and also subject to such direction or appointment where the same shall happen not to be a complete and entire appointment of the whole interest and property therein, as to for and concerning all my said freehold, copyhold and leasehold messuages, lands, tene-

No. 8.

And subject to the aforesaid payments in trust to pay to testator's son, J. H., all the rents, profits, and annual produce of the real and personal estates for his life, and after his decease, in trust for his child, renaccording to his appointment.

And in default of appointment, then as to the messuages, lands and tenements to and amongst the children of J. H. in equal



## No. 8.

proportions with survivorship.

And in default of such children of testator's son, J. H., then to and amongst testator's younger children in equal shares, with survivorship.

And as to the monies, stocks, and residuary personal estate to and amongst the children of J. H. equally, with survivorship.

ments and hereditaments, in trust for all and every the child and children of my said son J. H. lawfully to be begotten in equal shares, if more than one, as tenants in common and not as joint tenants, and for their respective heirs, executors, and administrators for ever ; and if any such child or children shall die under the age of 21 years, then as well the original share of him her or them so dying, as all such other share or shares as shall survive to him her or them on the death of any others or other of the said children under the said age of 21 years shall be in trust for the survivors or survivor and others or other of them in equal shares if more than one as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns for ever ; and in case there shall be no child or children of my said son J. H. or being such, all of them shall die under the age of 21 years, then my said freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, or so much thereof whereof there shall have been no such direction or appointment as aforesaid, shall be in trust for all and every my said daughters and younger sons and other child and children begotten or to be begotten, and whether born in my life-time or after my decease in equal shares if more than one, as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns for ever ; and if any such child or children shall die under the age of 21 years, then as well the original share of him her or them so dying, as all such other share or shares as shall survive to him her or them on the death of any others or other of the same children under the said age of 21 years shall be in trust for the survivors or survivor and others or other of them in equal shares if more than one, as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns ; and from and after the death of my said son J. H. as to for and concerning all and singular my monies, stocks, funds, securities, and residuary personal estate whatsoever subject as aforesaid, in trust for all and every the child and children of my said son J. H. lawfully to be begotten equally to be divided between and amongst them if more than one, share and share alike, and if there shall be but one such child then for such

No. 8.

only child, and if any such child or children being a daughter or daughters shall die under the age of 21 years and without having been married, or being a son or sons shall die under that age, then the part or share parts or shares of him her or them so dying, shall go and be transferred to the survivors or survivor of them and the executors, administrators and assigns of such of them being dead, who being a daughter or daughters shall have attained the age of 21 years, or been married, or being a son or sons, shall have attained the age of 21 years, at such time or times as his her or their original share or shares shall become transferable or as soon afterwards as circumstances will permit; and my mind is, and I declare that all and every the share or shares so directed to survive and accrue shall from time to time survive and accrue together with the original share and shares until such original share and shares shall by virtue of this my will become vested; and in case there shall be no such child or children of my said son J. II. who being a daughter or daughters shall attain the age of 21 years, or be married, or being a son or sons shall attain the age of 21 years, then my will and mind is, and I do hereby declare that my said trustees and their executors, administrators and assigns shall stand and be possessed of and interested in all and singular the same monies, stocks, funds, securities, and residuary personal estate whatsoever upon the same trusts and to and for the same ends, intents, and purposes as are hereinbefore expressed and directed concerning the said sum of 8000*l.* directed to be raised as portions for my said daughters and younger sons as aforesaid or such of them as shall be then subsisting and capable of taking effect and to be payable and transferable for the sole benefit and separate use of my daughters in like manner as their said portions in the said sum of 8000*l.*; provided always, and my will is, and I do hereby direct that in case my said son J. II. or his assigns shall punctually pay the said sum of 8000*l.* as portions for my younger children when and as the same portions shall respectively become payable under the directions of this my will, and every part thereof, and the interest monies herein-after directed to be paid in respect of the same, and also the said annuity of 365*l.* to my said wife for her life and every part

And in default of such children of J.H. then to and amongst testator's younger children, in like manner as the 8000*l.* was directed to go and be divided.

**No. 8.** thereof at the times and in the manner hereinbefore mentioned, and until default shall be made in some of the same payments, the trustees for the time being of this my will shall from time to time, and at all times permit and suffer or allow my said son J. H. and his assigns during his life to receive and take the rents, issues, and annual produce and income of my said real and personal estate, and of every part thereof (subject as hereinbefore mentioned) to and for his and their own absolute use and benefit without any hindrance, interruption, or disturbance whatsoever; and in case my said son J. H. shall with his own monies pay or advance the whole or any part of the principal of the said sum of 8000*l.* then and in such case, and to that extent he shall be and remain a creditor upon the real and personal fund hereinbefore made liable to the raising and payment thereof, and he or his executors, administrators or assigns shall and may have the amount of the principal so to be advanced by him raised and levied by the ways and means aforesaid by and out of the said real and personal fund to and for his and their own use and benefit together with interest thereof from the time of his death, if the same shall not have been before raised after the rate of 5*l.* per centum per annum; Provided also, and I direct that from and after my decease, interest money at the rate of 3 pounds for one hundred pounds for a year upon such of the respective portions of my said daughters and younger sons of and in the said sum of 8000*l.* thereinbefore provided for them as shall not at the time of my decease be payable by virtue of this my will shall be paid by my said son J. H. or his assigns during his life, and after his death by the person or persons entitled to the fund subjected to the payment thereof, and in default of the regular payment thereof, shall be raised and paid by the said trustees for the time being, by and out of the rents, issues, and annual produce of my said real and personal estate, or by mortgage, sale, or other disposition of the whole or a sufficient part thereof until the same portions shall respectively become payable under the directions of this my will, or until the death of my said wife, which of the events shall first happen, the same interest money or a sufficient part thereof to be paid into the hands of my said wife for the maintenance,

Testator's son, J. H., to enjoy the produce of the estates, on his paying the above charges and sums.

Such son, upon his paying the 8000*l.* to become a creditor to the estate for the same.

Interest to be 3 per cent. upon the portions.

education, and support of such of my said daughters and younger sons to whom the same portions shall belong during the term of her natural life, and from and after the decease of my said wife, interest after the rate of 5*l.* for one hundred pounds for a year upon such of the same respective portions as well original as accruing, as shall not at my death be payable shall be paid by my said son J. H. or his assigns during his life, and after his death by such other person or persons as aforesaid, and in default of such payment by my son or such person or persons as aforesaid, the same shall be raised and paid by the trustees for the time being of this my will by the means aforesaid until the same portions shall respectively become payable; and the whole, or a sufficient part thereof shall be applied by the same trustees for the maintenance, education, and support of such of my said daughters and younger sons respectively to whom the same portions shall belong. And I direct that the residue (if any) of such interest money after maintaining and educating my said daughters and younger sons as well during the life of my said wife as afterwards, and until their said portions shall respectively become payable in manner aforesaid, shall be placed out or invested in or upon government or real securities, from time to time to accumulate, and such accumulation shall go along with the principal portions from whence the same shall arise. And it is my will and I hereby declare and direct that it shall and may be lawful for the major part of the trustees of this my will for the time being, when and so often as they shall think necessary, to raise and advance by and out of the rents, issues, and annual produce and income of my said real and personal estate, or by mortgage or sale thereof, or by all or any of the same ways and means, or by such other ways and means as they shall think proper, any sum or sums of money for the purpose of apprenticing, placing out, or other advancement of any one or more of my said younger sons during his or their minority, not exceeding the sum of 300*l.* for each son, the same sum and sums of money to be taken and considered as and in part of the portion or share or respective portions or shares, as well original as accruing, of such son and sons for whom the same monies shall be so advanced, of and in the said sum of 8000*l.* hereina-

No. 8.

Interest on the portions till payable

To be applied for maintenance, &c.

The residue to accumulate.

Part of the portions to be applied, if necessary, in and towards the advancement in the world of any of the younger children.

**No. 8.**

The portions of the daughters to be for their separate use, and not to be charged or anticipated by them.

before directed to be raised for the benefit of my daughters and younger sons as aforesaid, and I direct that my said trustees and their executors, administrators and assigns shall stand and be possessed of and interested in such portion or portions, as well original as accruing, as is or are hereinbefore provided for such of my younger children as shall be a daughter or daughters by and out of the said sum of 8000*l*. when and as the same shall be paid and payable, upon trust to place out or invest such sum or sums of money in or upon government or real securities at interest and from time to time to alter vary and transpose such securities and funds, and to stand and be possessed of and interested in the money so to be placed out in trust to pay the interest, dividends, and annual produce thereof into the proper hands of such daughter or daughters according to her or their share or respective shares and interests therein, or into the hands of such person or persons as she or they by any note or writing under her or their hand or hands shall from time to time, but not by way of anticipation, charge, or assignment, appoint to receive the same, during the life or respective lives of such daughter or daughters, to the intent that the same may be for her or their sole and separate use, and may not be subject to the debts, controul, disposition, or engagements of any present or future husband or husbands of such daughter or daughters, and from and after the decease of such daughter or daughters respectively upon such trusts and to and for such intents and purposes, and under and subject to such powers, provisos, and declarations as such daughter or daughters respectively, notwithstanding her or their coverture, by her or their will or respective wills, or any writing or writings purporting to be such will or wills, or any codicil or codicils to be signed and published in the presence of, and to be attested by two or more credible witnesses, shall direct or appoint; and in default of, and in the mean time, until some such direction or appointment shall be made, and as to so much, and such part or parts thereof, whereof no such direction or appointment shall be made, or where the same shall not be a complete and entire appointment of the whole interest and property therein, in trust for such person or persons of the blood and kindred of such daughter or daughters living at the time of the decease of such daughter or daughters respectively, as



would by virtue of the statutes of distribution have become entitled to the same. And my will is, and I further direct that in case my said son I. H. or his assigns shall happen to make default in payment of the portions hereinbefore provided for my younger sons and daughters, or of any part of the same, or in payment of the annuity of \$65<sup>1</sup>/<sub>2</sub>. to my said wife or any other sum or sums of money herein directed to be paid, when and as the same monies shall respectively become payable by virtue of this my will, and my said trustees shall, in pursuance of my directions for that purpose given, by mortgage, sale, or other disposition of all or any part of my said real and personal estate, happen to raise and levy more money than will be sufficient to pay such sum or sums of money upon such default as aforesaid, then the residue of the money so raised and remaining in hand after application of a sufficient part thereof for the purposes of this my will, shall be placed out in or upon government or real securities at interest in the names of my said trustees, who shall stand and be possessed of such securitie suppon the same trusts, and to and for the same intents and purposes, and under and subject to the same powers as are herein expressed, declared, and contained of and concerning my real and personal estate or such of them as shall be then subsisting and capable of taking effect, regard being had to the nature of the fund from whence the monies so to be invested in securities shall respectively arise. And I do hereby authorise, empower, and direct the trustees for the time being of this my will from time to time as occasion shall require, and as they shall think proper, during the continuance of the trusts by me herein declared of and concerning my said leasehold premises, to apply for, and do their endeavours to renew the leases or respective leases of the same premises, the costs and charges of all which renewals I do hereby charge on the whole of my real and personal estate so hereby devised and bequeathed to my said trustees as aforesaid; and I order and direct that all new leases to be obtained of the same leasehold premises shall be and be declared to be on the like trusts, and subject to the like powers, provisos, and directions as are herein declared of and concerning the now subsisting lease or leases of the same premises, or such of the same trusts as shall be then subsisting. I direct

If upon default in payment of the portions the money raised by mortgage, &c. shall be more than the sum wanted, the overplus to be invested upon the same trusts as before-mentioned concerning the settled estates.

Trustees to renew leases.

Debts and funeral expences.

**No. 8.** that all my just debts, testamentary and funeral expences shall be paid by my executors and executrix as soon as conveniently may be after my decease; and I declare that it shall and may be lawful for my said son J. H., T. O. and W. R., and my said wife M. H. and the trustees to be appointed as hereinafter mentioned, or the major part of them for the time being, from time to time to agree and compound with any person or persons who at or after my decease shall be debtors, accountants to, or who shall appear or pretend to be creditors or demandants upon my estate and effects, or upon my trustees or executors and executrix in respect thereof, in all cases where the same in the judgment of my said trustees and executors and executrix, or the major part of them, shall seem necessary or reasonable, and to take such part as can be gotten in full discharge of all such debts, and also to give such consideration as will be accepted in full discharge of all such demands, as shall be thought most advantageous for my estate and the persons interested therein.

And my will further is, and I hereby declare that my said trustees respectively, shall from time to time and at all times have full power by indenture or indentures under their respective hands and seals, to demise, lease, and grant my said freehold, copyhold, and leasehold premises or any part or parts thereof unto any person or persons for any term or number of years not exceeding 21 years, to take effect in possession and not in reversion or by way of future interest, so as upon all such leases there be reserved to continue payable quarterly or half yearly, during the term thereby to be granted, the best and most improved yearly rent or rents that can be reasonably had or got for the same without taking any fine, premium, or foregift, and so as in all such leases there be contained conditions for re-entry for non-payment of the rent, and so as no clause be contained in any of the said leases giving power to any lessee to commit waste, and so as the respective lessees execute counterparts of all such leases, and so as the leases of the said copyhold parts of the said premises be made according to the custom or customs of the manor or manors whereof the same are holden, and the leases of the leasehold parts of the said premises be made to determine before determination of the terms or interest of my said trustees therein. Provided also, and I declare and

Power to the trustees to compound debts, &c.

Leasing power.

direct if my said son J. H. and the said T. O. and W. R. or any two of them, or two of any future trustees to be appointed as hereafter is mentioned shall die or be desirous of being discharged of and from, or refuse or decline to act or become incapable of acting in the trusts hereby in them reposed as aforesaid, before the said trusts shall be fully performed or discharged, then and in such case, and when and as often as the same shall happen, it shall and may be lawful for the trustees so declining to act, or the executors, or administrators of such of them so dying, by any writing or writings sealed and delivered by them, and to be attested by two or more credible witnesses from time to time to nominate substitute or appoint any other persons to be trustees in the stead or place of the trustees so dying or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid, so that there be at all times three acting trustees of this my will until the trusts thereof shall be fully completed; and in default of such appointment it shall be lawful for my younger children, or any of them, in like manner to appoint such new trustees, and which I hereby direct to be done accordingly, and that my will may be strictly complied with in this my request; and I direct that when and as often as any new trustees shall be nominated and appointed as aforesaid, all the said trust estates, monies, securities, and funds shall be thereupon with all convenient speed conveyed, assigned, and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustees of the same trust estates, monies, and premises, and such new trustees jointly, or if there shall be no such continuing trustees, then in such new trustees wholly, to for and upon such and the same trusts intents and purposes as are hereinbefore declared or expressed of and concerning the said trust estates, securities, monies, and premises as aforesaid, or such of them as shall be then subsisting and capable of taking effect; and that all such new trustees shall and may in all things act and assist in the management and carrying on and execution of the trusts to which they shall be so appointed, as fully and effectually, to all intents, effects, constructions, and purposes whatsoever, and shall have, and be considered as

No. 8.

Clause for  
changing  
trustees.



**No. 8.** invested with such and the same powers and authorities as if they had been originally in and by this my will nominated trustees for the purposes for which such new trustees shall be appointed, any thing hereinbefore contained to the contrary hereof in any wise notwithstanding. And I appoint my said wife during her widowhood, guardian of all my infant children living at my death, or born afterwards, until the sons shall attain the age of 21 years and the daughters shall attain that age or be married; and after the decease or second marriage of my said wife which shall first happen, I appoint the said T. O. and W. R. and the survivors and survivor of them guardians and guardian of my said infant children as aforesaid; and I appoint my said son J. H. and the said T. O. and W. R. and my said wife executors and executrix of this my will. I give to each of them the said T. O. and W. R. the sum of 100*l.* on condition of their respectively acting in the trusts and execution of this my will but not otherwise; and I give to my said son J. H. and the said T. O. and W. R. their heirs and assigns all such real estates as are now vested in me by way of mortgage in order to enable them with the greater ease and convenience to recover, receive, and get in the money secured by such mortgages for the purposes of this my will; and I give to my said son J. H., T. O., and W. R. all such real estates as are now vested in me upon any trust or trusts, to hold the same to my said son J. H., T. O., and W. R. their heirs and assigns upon the trusts affecting the same. Provided always, and it is my will and mind, and I do hereby declare that it shall and may be lawful to and for my said son J. H., T. O. and W. R. and all future trustees to be appointed as hereinbefore mentioned, their and every of their executors and administrators, by and out of all or any of the monies which by virtue of this my will shall come to their or any of their hands, to deduct, retain to, and reimburse themselves and himself, and to pay or allow to his and their co-executors, co-executrix, and co-trustees or co-trustee all such costs, charges, and expences as they respectively shall and may sustain, expend or be put unto, in or about the execution of this my will, or any of the trusts herein contained; and also that they and their respective executors and admi-

Devise of the mortgage and trust estates of the testator to the trustees to get in the mortgage debts, and to hold the trust estates upon the trusts affecting the same.

nistrators shall be charged and chargeable only, every of them for and with his and their own respective receipts, payments, acts, and wilful defaults, and not otherwise, and shall not be charged or chargeable with or for any sum of money other than such as shall actually and respectively come to his or their hands by virtue of this my will, nor with or for any loss or damage which may happen in or about the execution thereof, or any of the trusts hereby declared, without his or their wilful default respectively. In witness whereof I the said J. H. the elder have to this my last will and testament contained in eleven sheets of paper set my hand to the first ten sheets, and my hand and seal to this last sheet the 20th day of April in the year of our Lord 1805.

No. 8.

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No. 9.

*A Will chiefly settling renewable leases upon collateral relations ; with other dispositions of personal estate.*

THIS is the last will and testament of me L. F., of ——— Whereas, under the will of ———, deceased, I am entitled in expectancy, on the death of the survivor of ———, and ———, to the absolute interest of, and in divers lands, tithes, and other hereditaments, situate, lying, arising, and being in the several parishes of ———, and ———, and elsewhere in the county of ———, and held by and under certain leases for years, renewable, under the dean and chapter of ———. And whereas I am also entitled, under, and by virtue of an indenture of settlement, bearing date the 20th day of October, 1804, in the event of my surviving ———, to certain monies, stocks, funds and securities, which have arisen from the sale of ———, in the county of ———, and which are vested in the names of

**No. 9.** the trustees, named and appointed in and by the said indenture of settlement. I do hereby give, devise, and bequeath **all the said leasehold estates, monies, stocks, funds, securities, and premises, to which I am so entitled in reversion, or expectancy as aforesaid, and subject to the said lives and events respectively, hereinbefore mentioned, and all other my estate, property and effects, real and personal, and of what nature and kind so ever, and wheresoever situate, subject to the payment of my just debts, funeral and testamentary expences, unto and to the use of A., B., C., upon the trusts hereinafter expressed and declared of and concerning the same respectively, (that is to say) upon trust that my said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, do by and out of the rents and profits of my said leasehold estates and premises, raise and lay apart such annual sum as they may deem sufficient for paying the rents, and performing the covenants reserved and contained by and in the original and subsisting leases thereof, as long as the said trusts hereby in them reposed, or any of them shall remain to be performed; and also by and out of such rents and profits of my said leasehold estates, set apart such sum of money annually, as they shall, in their judgment and discretion, deem sufficient to renew the leases of the same premises, and take new leases thereof respectively in their own names, when, and as it shall be usual and requisite, and also from time to time make such proper surrenders of the leases subsisting, as shall be requisite or necessary, or incident to such renewals, and also do and shall, by and out of the rents and profits of the said leasehold estates, and such annual, or other sums so set apart as aforesaid, pay and discharge the fines and fees which shall or may be duly demandable and payable upon such renewals, all which renewed leases shall be vested in them the said trustees, for the time being, upon the same trusts, and for the same intents and purposes, and with under and subject to the same powers, provisos, limitations and declarations, as are contained and referred to in this will, concerning the present subsisting leases, or any of them. And I do hereby also empower and direct my said trustees for the time being, during the time afore-**

**Devise of all the personal estate to trustees.**

**Out of the rents and profits to set apart a sufficient sum to pay the rents reserved on the original leases, and also the expences of the renewals.**


said, out of such rents and profits of the said leasehold estates and premises as aforesaid, to discharge and defray all such expences as may be incident to, and incurred in the proper management of the said leasehold premises, or in receiving and recovering the rents thereof; and subject to such expenditure and disbursements, do and shall, out of such rents and profits of the said leasehold estate, pay and discharge the several annuities, or clear yearly sums following (that is to say) to ———, if he shall survive me, the clear yearly sum of 400*l.* for and during the term of his life; to my brother, O. F., the clear yearly sum of 300*l.* for and during his life; to ———, the clear yearly sum of 60*l.* for and during his life; to ———, the clear yearly sum of 40*l.* for and during his life; to ———, the clear yearly sum of 100*l.* for and during her life; to ———, the clear yearly sum of 50*l.* for her life: the said several annuities of 400*l.*, 300*l.*, 60*l.*, 40*l.*, 100*l.*, and 50*l.*, to be paid quarterly, by equal payments in every year, and a proportionate part of such quarterly payment (if any) as shall be accruing, and not have actually accrued due at the time of the decease of each of the said several annuitants respectively, the first payment of each of the said sums to begin and be made at the expiration of three months after my decease; and subject to the several aforesaid annuities, payments and provisions, I will and direct, that my said trustees for the time being do and shall stand and be possessed of all the said last mentioned leasehold estates and premises, so to them devised and bequeathed as aforesaid upon trust, to pay or empower my brother, M. F., and his assigns, to receive the rents and profits, interest, dividends, and annual proceeds of the same respectively, for his and their own absolute use and benefit, for and during the term of his natural life, and from and after the decease of my said brother, M. F., do and shall stand and be possessed of and interested in the said leasehold estates and premises subject as aforesaid, in trust for the first son of my said brother, M. F., of his body lawfully begotten, his heirs, executors, administrators and assigns; but nevertheless, in case such first son shall happen to die before he shall have attained the age of 21, and without lawful issue of his body begotten, then do and shall stand and be pos-

No. 9.

And to defray the expences of management. And subject to such payments and disbursements, to pay annuities.

To pay to or empower testator's brother to receive the rents and profits for his life.

Trusts for unborn children with executory trusts over upon their dying before 21.

**No. 9.**  sessed of and interested in the same premises, in trust for the second son of my said brother, M. F., his heirs, executors, administrators and assigns, and in case such second son of my said brother shall happen to die before he shall have attained the said age of 21, and without lawful issue of his body begotten, then in trust for the third and every other son and sons of my said brother, M. F., in like manner successively, according to the order of their birth, with like limitations over in the event of their respectively dying before 21, and without lawful issue as aforesaid; and in case there shall be no son of my said brother, M. F., lawfully begotten, living at his death, or there being any such, they shall all die before they shall attain the age of 21, and without lawful issue as aforesaid, then in trust for all and every the daughter and daughters of the body of the said M. F., lawfully begotten, his and their heirs, executors, administrators and assigns, to be equally divided between and among them, if more than one, as tenants in common, and in case there shall be more than one, and any one of them shall die under the age of 21, and without having been married, then in trust for the survivors or survivor, others or other of them their or her heirs executors, administrators and assigns, with like remainders over, in every like event of the death or deaths of any one or more of the surviving daughters under age and unmarried, to and amongst the survivors or survivor, others or other of the said daughters, such survivorship and accruer to extend in every such case, as well to the surviving as to the original shares, and if there shall be no such daughters or daughter, or none that shall live to be married, or to attain the age of 21, then as to the said leasehold estates and premises, subject as aforesaid, in trust for my brother, N. F., for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common with, and subject to the same conditional limitations and devises over to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother, M. F.; provided nevertheless, and my will is, that in the event of the decease of my said brother, M. F., without leaving issue of his body lawfully begotten, or leaving such

issue, and the sons (if any) shall all die before the age of 21, and without leaving issue as aforesaid, and the daughters (if any) shall all die before such age, and before any of them shall have been married as aforesaid so as to give effect to the conditional devise or limitation over to the said N. F., and his family, the said annuity of 300*l.* hereinbefore directed to be paid to the said O. F., shall cease to be payable, and instead thereof the annual sum of 500*l.* shall be paid to him and his assigns for and during the remainder of his natural life; and in case my said brother, N. F., shall die without leaving any children of his body, lawfully begotten, or there being such, all of them shall die, the sons (if any) before the age of 21, and without leaving issue as aforesaid, and the daughters (if any) before that age, and before any of them shall have been married as aforesaid, then as to the said leasehold estates and premises, and subject as aforesaid, in trust for my said brother, O. F., for his life, with remainders to his first, and other sons successively, and to his daughters after them, as tenants in common with, and subject to the same conditional limitations and devises over to and amongst them respectively, as are hereinbefore contained, limited, and provided, with respect to the sons and daughters of my said brothers, M. F., and N. F., as aforesaid. But in the event of such succession of my said brother, O. F., and his family to the beneficial interest in my said leasehold estates, under the said last mentioned disposition, my will is, that the annuity of 100*l.* hereinbefore by me directed to be paid to ———, do cease to be payable, and that instead thereof an annuity of 200*l.* be paid to her, and her assigns, for and during the remainder of her natural life. Provided always, and my will further is, that in case it shall so happen that my said brother, M. F., shall become intitled to the beneficial interest of and in the trust property contained in, and settled by the said indenture of the 20th day of October, 1804, under the limitations and provisions therein contained, or any of them, the said O. F., shall be entitled to receive out of the rents and profits of the said leasehold estates and premises, hereinbefore by me devised and bequeathed in trust as aforesaid, in lieu of the said annuity of 300*l.* the annual sum of 500*l.*, for and during the remainder of his na-

The estates and interests to shift on certain events.

**No. 9.**

If all the brothers die without issue living to acquire vested estates then in trust for — for his life, remainder to the uses, &c. after limited and expressed with respect to the ultimate residue.

Concerning the residue of the personal estate to convert the same into money and invest it in the funds. Testator then settles the same in the same way as his before-mentioned leasehold estates.

tural life, and in case of the deaths of my said brothers, M. F., N. F., and O. F., without leaving any such children of any of their bodies respectively, as aforesaid, or any that shall live to the age of 21 years, or have issue of their body, or bodies, if a son or sons, or be married, if a daughter, or daughters, then my will is, that my said trustees for the time being, do and shall stand, and be possessed of and interested in all my said leasehold estates, and premises, late the property of —, so devised and bequeathed to them in trust, as aforesaid, subject to the several annuities, and other charges, in trust for —, for the term of his natural life, and from and immediately after his decease, upon the trusts, and for the several ends, intents, and purposes hereinafter more particularly mentioned, touching the ultimate residue of my general personal estate. And as to, for, and concerning so much, and such part of my estate and effects as I shall become entitled to under, and by virtue of the said indenture of the 20th of October, 1804, in the event of my surviving —, and all other my estate and effects, whatsoever and wheresoever; I direct the said, &c. and the survivors and survivor of them, his executors, administrators and assigns to stand possessed thereof, upon trust, as to such part and parts thereof, as may not, at the time of my decease, consist of stock in the public funds, to collect, get in and convert the same into money, and then to lay out and invest such money in some or one of the public funds and parliamentary stocks of Great Britain, in their own names, and as to such stocks, funds and securities, and also as to all other my property, estate and effects so devised and bequeathed to them as aforesaid, except the said leasehold property and estates which I have by this my will hereinbefore disposed of, to pay to or permit my said brother N. F. and his assigns, to receive the dividends, interest and annual produce thereof, for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common, with and subject to the same conditional limitations and devises over, to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother, touching the leasehold estates in the county of

—, hereinbefore devised by my said will ; and in case my said brother N. F. shall die without leaving any children of his body lawfully begotten, or, there being such, all such as shall be sons shall die under 21, and without issue as aforesaid, and all such as shall be daughters shall die before that age and before any of them shall have been married as aforesaid, then subject as aforesaid, in trust for my said brother M. F. for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common, with and subject to the same conditional limitations and devises over, to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother N. F., and in case my said brother M. F. shall die without leaving any children of his body lawfully begotten, or there being such, all such of them as shall be sons shall die under the age of 21, and without issue as aforesaid, and all such as shall be daughters, shall die under that age and unmarried, then subject as aforesaid, in trust for my said brother O. F. for his life, with remainders, in like manner, to his first and other sons, and to his daughters as tenants in common, in like manner ; and with and subject to such conditional limitations as are before provided, with respect to the sons and daughters of my said brothers N. F. and M. F. successively ; and in case the said O. F. shall die without leaving any children as aforesaid, or, there being such, if all such as shall be sons shall die under the age of 21, and all such as shall be daughters shall die under that age and unmarried, then, subject as aforesaid, in trust for T. C., the eldest son of —, for his life, with remainders to his first and other sons, and to his daughters as tenants in common, in like manner, and with and subject to such conditional limitations as are before provided, with respect to the sons and daughters of my said brothers, N. F., M. F. and O. F. successively ; and in case the said — shall die without leaving any children as aforesaid, or, there being such, all such as shall be sons, shall die under 21, and all such as shall be daughters shall die under that age and unmarried, then subject as aforesaid, in trust for T. C. the second son of the said —, for his life, with remainders to the first and other sons aforesaid, and to his daughters as tenants in common



**No. 10.** in like manner, and with and subject to such conditional limitations as are before declared, with respect to my aforesaid brothers, and in case the said T. C. shall die without leaving any children as aforesaid, or, there being such, all such as shall be sons, shall die under 21, and without issue as aforesaid, and all such as shall be daughters shall die under that age and unmarried, then, subject as aforesaid, in trust for G. F. the daughters of the said —, by his present wife, for her life, with remainder to her first and other sons, and to her daughters as tenants in common, in like manner, and with and subject to such conditional limitations as are before provided, with respect to my said brothers and their children respectively; but in case the said &c. shall all happen to die without leaving any issue lawfully begotten as aforesaid, then I direct my said trustees to stand possessed of all the rest, residue and remainder of my said estate and effects, upon the trusts, &c.



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**No. 10.**

*Will of an unmarried man, disposing of Property chiefly in charities and legacies.*

**THIS** is the last will and testament of me, ———, of ——— street, in the parish of ———, I desire to be buried in the same grave with my late wife, in ——— church yard, with as little ceremony as may consist with decency and propriety, and that a neat monument with proper inscriptions may be placed over the said grave, to her memory and mine; and my will is that all my funeral and testamentary expences, and all debts which shall be justly owing by me at my death, may, in the first place be duly paid and satisfied, with the payment whereof I hereby charge all my personal estate and effects of every descrip-

Debts, funeral and testamentary charges.

tion; I give, devise and bequeath unto — and — all No. 10.  
 that my copyhold or customary messuage, or tenement, gar-  
 den and premises, with the appurtenances situate in —  A copy-  
 aforesaid, held by me of the manor of —, and which I hold estate  
 have duly surrendered to the use of my will, to hold to them to two per-  
 and their heirs and assigns for ever, as tenants in common sons as te-  
 and not as joint tenants; I give unto the treasurer for the nants in  
 time being of St. George's Hospital, at or near Hyde Park common.  
 Corner, the sum of —l. to be applied to the purposes of Charities,  
 the said hospital; to the treasurer for the time being of the  
 'Middlesex Hospital, in or near —, the like sum of  
 —l. to be applied to the purposes of the said hospital; to  
 the treasurer for the time being of the Asylum for the Sup-  
 port and Education of the Deaf and Dumb Children of the  
 Poor, situate in or near the Kent Road, near St. George's  
 Fields, the like sum of —l. to be applied to the purposes  
 of the said asylum; to the treasurer for the time being, of  
 the Asylum, or House of Refuge for Orphan Girls, situate  
 near, or between Westminster Bridge and St. George's  
 Fields aforesaid, the like sum of —l. to be applied to the  
 purposes of the said asylum; and to the treasurer for the  
 time being, of the — Charity School, in or near —, the  
 like sum of —l. to be applied to the purposes of the said  
 school; and as to all the rest, residue and remainder of my  
 lands, tenements, hereditaments and real estate whatsoever  Sweeping  
 and wheresoever, to which I am beneficially entitled, or residuary  
 which have been conveyed to or vested in me by way of devise to  
 mortgage or security, or in trust, and all my estate, right, trustees.  
 title and interest in and to such mortgaged premises, and all  
 securities for money, and all my stocks, turnpike bonds, in-  
 surance and other shares, and all other my goods, chattels,  
 and personal estate and effects whatsoever and wheresoever,  
 and of what nature or kind soever, (except such as are  
 herein specifically, or otherwise by me disposed of) and all  
 my estate and interest therein respectively, I give, devise,  
 and bequeath unto A., B., C., and D., their heirs, execu-  
 tors and administrators respectively, according to the sever-  
 al natures and qualities of the same, upon the trusts fol-  
 lowing, (that is to say,) upon trust that they the said A., B.,  
 C. and D., and the survivors and survivor of them, and the

## No. 10.

Upon trust as to the property vested in the testator as trustee upon the trusts concerning the same, as to the premises held on mortgage to receive the debt and interest and reconvey, and as to the rest of the residuary property to get in and sell, and convert into money, &c.

heirs, executors and administrators of such survivor, do and shall stand and be seised and possessed of all the estates and property vested in me as a trustee upon the trusts thereof, declared concerning the same respectively, and of the premises which I am seised or possessed of, or entitled to by way of mortgage, upon trust, to re-convey, assign, and dispose of the same respectively, when the principal and interest, and all other monies thereby secured, respectively shall be paid off, and do and shall receive the principal and interest, and other monies which shall be due therefrom respectively, and give receipts for the same when paid, and also do and shall, as soon as conveniently may be after my decease, collect and get in all such parts of the said residue as shall consist of money, or securities for money, and do and shall sell and dispose of all such of the said residue of my real estates of whatsoever denomination, to which I am beneficially entitled, and whereof I have power to dispose, and all my leaseholds and chattels real, and all other such parts of my personal estates and effects as shall be saleable (except such as herein are by me specifically disposed of) either by public auction or private contract, or otherwise, at their discretion, at or for the best price and prices that can or may be had and obtained for the same respectively; and I hereby declare that the receipt or receipts of my said trustees, or the survivor of them, or the executors or administrators of such survivor, or of the trustees or trustee of this my will, for the time being, shall be effectual discharges upon every such sale or sales to the purchaser or purchasers of the several premises herein made saleable, or any part or parts thereof, for his, her or their purchase monies, or for so much money as shall be therein acknowledged or expressed to have been received, and that such purchaser or purchasers, his, her or their heirs, executors, administrators and assigns, or any of them, shall not afterwards be answerable or accountable for any misapplication or nonapplication of such purchase money so received, or any part or parts thereof; and I will and direct, that out of the monies which shall arise and be produced by the sale or sales of such part or parts of my said estates and effects as are merely of a personal nature, except my leasehold tenements, the sum of —*l.* of lawful money of Great

Britain, be set apart, and laid out and invested in the purchase of stock in some or one of the government funds or parliamentary stocks of Great Britain, the same to be transferred into the names of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or the trustees or trustee for the time being, of this my will, in the proper books kept for that purpose, and my will is that my said trustees or trustee for the time being, do stand possessed of, and interested in the said sum of 2400*l.* or the stock or securities in which the same may be invested; upon trust to pay and apply so much of the annual interest, dividends, and proceeds thereof as they my said trustees for the time being shall think necessary or proper for purchasing suitable cloaths or apparel for the 10 poor men and 10 poor women, for the time being belonging to and residing in the almshouses called ——— almshouses at ——— in the county of ——— at or about Christmas yearly, and to pay, apply, or dispose of the remainder thereof in equal proportions among or to and for the use and benefit of the said poor men and women. And I further direct that out of the said monies which shall arise and be produced by the sale or sales of such part or parts of my said estates and effects as are merely of a personal nature, except my leasehold tenements, the further sum of ——— *l.* of lawful money of Great Britain shall be set apart and placed out in the same manner as I have before directed with respect to the said last mentioned sum of money, and that my said trustees or trustee for the time being do lay out and apply the dividends and interest of the said last mentioned sum, or the stocks, funds, and securities in or upon which the same shall be invested as aforesaid in the purchase of bread of good quality to be distributed every Sunday morning after divine service among such 20 of the most deserving poor persons for the time being residing in the same parish and the township of ———, and who shall not receive other alms or parochial relief, the exercise and distribution of which charity my said trustees are hereby authorized and recommended to commit to the discretion of the rector and churchwardens of the said parish of ———,

No. 10.

Out of the money which shall be produced by the sale of the personal estate, to provide cloaths for certain poor persons.

And bread for such as do not receive alms, or parochial relief.

## No. 10.

To set apart 7000*l.*, and place out the same in the funds, and to pay the interest or dividends to the testator's half sister, for her separate use, and after her decease, to her husband for his life, and after the death of the survivor, to pay over the principal to and among their children.


for the time being. And I will and desire that my said trustees and the survivors or survivor of them, or the trustees or trustee of this my will for the time being, do and shall out of the said trust monies so to arise and be produced by such sale and sales of my real and personal property, or which shall be collected or got in, or be in their hands under and by virtue of this my will, raise and set apart the sum of 7000*l.* of lawful money of Great Britain, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in the names of my said trustees or trustee for the time being, and do and shall stand and be possessed of and interested in the same money, stocks, funds, and securities, in trust to pay the dividends and interest thereof unto my half sister M. H. the wife of T. H. of ———, in the said county of ———, or to authorize and empower her to receive the same half yearly as the same shall become due during her natural life, the same to be paid into her own hands, or to such person or persons as she shall by writing under her hand appoint to receive the same, notwithstanding her coverture, and not to be subject to the controul; debts, or engagements of her husband, and her receipts, or the receipts of such person or persons as she may appoint to receive the same, to be the only proper discharges for the same; and after her decease, do and shall pay to, or empower her said husband T. H., if he shall survive her, to receive the said dividends and interest of such stock for and during the remainder of his natural life; and after the death of the survivor of them the said M. H. and T. H. that they my said trustees, or the trustees or trustee of this my will for the time being, do and shall transfer the principal of such last mentioned stock unto and equally between and among all and every the child or children of the said M. H. and T. H. who shall be living at the decease of the survivor of them, and the lawful issue of such of the children of the said M. H. and T. H. as shall have died in the lifetime of the survivor of them, in equal shares and proportions, but so and in such manner as that such issue of any of the said children who shall have died in the lifetime of the survivor of the said M. H. and T. H. shall only receive (in equal propor-

tions if more than one) the share or proportion to which their his or her deceased parent would, if living, have been entitled. I also direct that my said trustees, or the trustee or trustee of this my will for the time being do and shall by and out of the said trust monies and effects so in their hands as aforesaid raise and set apart the further sum of 3000*l.* of like lawful money, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in their or his own names or name as aforesaid, and do and shall stand and be possessed of and interested in the same, in trust to pay the dividends or interest of such last mentioned stocks, funds, and securities unto A. C. the wife of my nephew H. C. of ——— in the said county of ——— half yearly as the same shall become due, during her natural life, the same to be paid into her hands or to such person or persons as she shall by writing under her hand appoint, notwithstanding her coverture, exclusively of her present or any future husband, who is not to intermeddle therewith, nor is the same to be subject to his controul, debts, or engagements, and her receipts or the receipts of such person or persons as she may so appoint to receive the same only to be effectual discharges for the same, and after her decease do and shall transfer the principal of such stock unto and equally between, or among all and every the child and children of the said A. C. and H. C. who shall be living at her decease; and the lawful issue of such of the said children as shall be then dead in equal shares and proportions, but so and in such manner as that the issue of any of the said children who shall die in the lifetime of the said A. C. shall only receive (in equal proportions if more than one) the share to which his her or their deceased parent would, if living, have been entitled. And I further desire and direct that my said trustees or the trustees or trustee for the time being do and shall out of the same trust monies and effects raise and set apart the further sum of 3000*l.* of like lawful money; and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in their or his own names or name, and do and shall stand and be possessed of and interested therein, in trust to pay the di-

No. 10.

Similar  
settlement  
on A. C.,  
the wife of  
H. C., and  
her child-  
ren, by H.  
C.

And on M.  
T., the wife  
of C. T.,  
and her  
children.

**No. 10.**  vidends or interest thereof unto M. T. the wife of C. T. of — in the said county of —, half yearly, as the same shall become due during her natural life, the same to be paid into her hands or to such person or persons as she shall by writing under her hand appoint to receive the same, notwithstanding her coverture, exclusively of her present or any future husband, and who is not to intermeddle therewith, nor is the same to be subject to his controul, debts, or engagements, and her receipts, or the receipts of such person or persons as she shall so appoint to receive the same only to be effectual discharges for the same; and after her decease do and shall transfer the principal of such last mentioned stock unto and equally between and among all and every the child and children of the said M. T. and C. T. who shall be living at her decease, and the lawful issue of such of the said children as shall then be dead in equal shares and proportions, but so and in such manner as that the issue of any of the said children who shall die in the lifetime of the said M. T. and C. T. shall only receive (in equal proportions if more than one) the share to which their, his or her deceased parent would, if living, have been entitled. And I will and direct that my said trustees or the trustees or trustee of this my will for the time being do and shall out of the said trust monies and effects also raise and pay for and to — the eldest son and — the second son of — the elder the sum of 1000*l.* a piece of lawful money of Great Britain and for and to — and — daughters of the said — the elder the sum of 500*l.* a piece of like lawful money (exclusively of the fund to which they or their respective issue may become entitled upon the decease of their said mother as hereinbefore mentioned) the same to become vested in and payable to the said — and — the sons when and as they respectively shall attain the age of 21 years, and the said — and — the daughters when and as they shall respectively attain that age or be married, and do and shall out of the said trust monies and effects raise and pay for and to the three sons and two daughters of Mr. — (that is to say) A. B. H. R. and T. the sum of 200*l.* a piece of like lawful money; and I will and declare that as to

the legacies hereinbefore given or directed to be raised No. 10.  
 and paid to and for the said A. B. H. R. and T. if ~  
 any one or more of such children respectively shall happen  
 to die before he she or they shall have acquired a vested in-  
 terest or vested interests under this will, the legacy or share  
 of the person or persons so dying, shall go and survive to  
 his, her, or their surviving brothers and sisters, and the issue  
 of such of the said children as shall have lived to acquire  
 vested interests, and that all and every the accruing share  
 and shares shall respectively again be subject to the same con-  
 dition and contingency of survivorship and accruer, as is here-  
 inbefore declared touching the original legacies or shares.

I give and bequeath to my dear niece (the daughter of The sum of  
 —, of —, and — his wife,) who has for many years 10,000*l.* to  
 resided with me; the sum of 10,000*l.* of lawful money of his niece,  
 Great Britain, which sum I desire may be laid out by my to be laid  
 said trustees, or trustee, for the time being, in some or one out in the  
 of the public funds, or parliamentary stocks of Great Bri- funds, and  
 tain, in the joint names of her the said —, and my said disposed of  
 trustees, or trustee, for the time being, to be disposed of as as she shall  
 she shall, by writing under her hand, direct; I also give to direct.  
 my said dear niece, —, all my household goods and fur-  
 niture, plate, china, glass and linen, to and for her own ab-  
 solute use and benefit; and I give to her brother, my ne- The sum of  
 phew, the said —, (son of the said —, and — 5000*l.* to  
 his wife,) the sum of 5000*l.* of lawful money of Great Bri- his nephew  
 tain, for his own absolute use and benefit; I also give to —, and  
 him, the said —, all my books, printed or written, and his books,  
 all my maps, accounts and papers whatsoever. I desire that maps, &c.

such of the legacies hereinbefore given, as shall not have be- Legacies,  
 come vested interests under this my will, may be laid out in not become  
 some or one of the public funds, or parliamentary stocks of vested, to  
 Great Britain, to accumulate for the benefit of those who be laid out  
 respectively shall be presumptively entitled thereto, with full in the  
 power, however, for my said trustees, or trustee, for the time funds, to  
 being, to pay or apply the dividends and interest thereof res- accumu-  
 pectively, or so much thereof as they, in their or his discre- late, with  
 tion may think proper or requisite, for or towards the main- power for  
 tenance or education of the person or persons so respectively the trus-  
 presumptively entitled, and in such manner as my said trus- tees to ap-  
ply the  
same, or so  
much as  
they shall  
think pro-  
per, to-  
wards the



No. 10.

mainte-  
nance of  
the child-  
ren pre-  
sumptively  
entitled.  
Residue to  
his nephew

Clause for  
changing  
trustees,  
&c.

tees shall think most fit for their respective benefit and advantage. And I direct that my said trustees shall stand possessed of the net surplus, or remainder of the whole of the said residue of my estate, effects, and property in trust for, and for the only absolute use and benefit of my nephew, ———, the younger, his executors and administrators, and to be paid, transferred, and disposed of, as he or they shall from time to time direct ; and my will is, that all the legacies and bequests hereby given, shall be paid and appropriated by my said trustees for the time being, as soon as conveniently may be after my decease. And I further declare it to be my will, and I do hereby direct, that in case the said ———, or any or either of them, or any succeeding or future trustee, or trustees shall die, or be desirous of being discharged from, or become incapable of acting in the same trusts before the same shall be fully executed and performed, that then, and in every such case, it shall and may be lawful to and for the surviving or continuing trustees or trustee of this my will, for the time being, or the executors or administrators of such survivor, by any writing, under his or their hand and seal, or hands and seals, and to be attested by two or more credible witnesses, to nominate or appoint any other fit and respectable person or persons to be a trustee, or trustees, for the purposes aforesaid, or such of them as shall be then subsisting, or capable of taking effect, in the place or stead of the trustee, or trustees, so dying, or desiring to be discharged, or becoming incapable of acting in the said trusts, and that when and so often as any such new trustee or trustees shall be nominated and appointed as aforesaid, the surviving, or continuing trustees or trustee for the time being, or the executors or administrators of such survivor shall assign and transfer my said trust estate and property, so and in such manner (so far as the nature thereof will admit,) as that the same may become vested in such new trustee, and the surviving or continuing trustee or trustees jointly, or in such new trustee only, upon the trusts, and to and for the intents and purposes hereinbefore declared of and concerning the said trust estate and property respectively, and which shall be then subsisting, or capable of taking effect, and so from time to time ; and such new trustee and

trustees shall and may act in the execution and management of the trusts aforesaid, and shall have, and be considered as invested with such and the same powers and authorities, as if he or they had been originally appointed by this my will ; and further, that they, the said ———, or any, or either of them, or their, any, or either of their executors or administrators, shall not be answerable for, or liable to make good any casual, or involuntary loss, which at any time or times may accrue or happen of or unto the said trust monies, or the securities for the time being in which the same shall be invested, or any part thereof, or with respect to any other part of the said trust estate, without his or their wilful default ; nor shall they, or any of them, be answerable or accountable, the one for the other, or others of them, or for the acts, deeds, receipts, payments, neglects, or defaults of the other or others of them, but each of them for his own acts, deeds, receipts and payments only, and for such monies only, as shall actually come to his or their several and respective hands, and not for any money or stock, for which they, or any of them, shall join in any transfer, or sign any receipt, or receipts, for conformity only, nor with or for any loss or damage which may happen, by depositing all or any of the trust monies aforesaid, in any bank or banker's hands, or elsewhere, for safe custody, nor with or for any other loss or damage which shall or may happen in or about the execution or exercise of all or any of the trusts aforesaid, without their wilful defaults. And that it shall and may be lawful to and for them, the said trustees respectively, and their respective executors and administrators, from time to time, by and out of the trust monies, which shall come to their, or any of their hands, in the first place to deduct and retain, and reimburse to themselves respectively, and allow to their or his co-trustee, or co-trustees, all such loss, costs, charges and expences whatsoever, as he, they, or either of them, shall or may respectively pay, suffer, sustain, expend, or be any way put unto, in, or about the execution of all or any of the trusts or powers, hereinbefore mentioned or created, or any matter or thing in any wise relating thereunto.

## No. 11.



## No. 11.

*A Will, disposing only of personal property, in favour of the Testator's daughter, and her children.*

Directions  
as to place  
and man-  
ner of in-  
terment.

THIS is the last will and testament of me, J. S., of T., in the county of ———, esquire : first, I will and direct, that in case I shall die within the distance of 10 miles from S., in the said county of ———, my body may be interred in the parish church there (where my late wife, A. S. lies buried,) in a decent, but very plain manner, at the discretion of my executors, hereinafter named, (who, in case of any occurrence taking place to prevent my being buried at the place above-mentioned, may direct my interment at such other place as they shall judge most proper,) the expences attending which interment, and also all my just debts, and the expences of proving this will, and also the legacies hereinafter by me given, I do direct my executors to pay and discharge as soon as conveniently may be after my decease. I do hereby constitute and appoint A. B., of ———, C. D., of ———, and E. F., of ———, to be the executors of this my will ; and, in the first place, I give and bequeath to them, the said A. B., C. D., and E. F., as such my executors, the capital stock or sum of 8000*l.* five per cent. annuities, or so much of such other stock standing in my name at the time of my decease, as will be sufficient to produce the annual sum of 400*l.* ; and in case I shall not, at the time of my decease, have sufficient stock standing in my

Appoint-  
ment of  
executors.  
Bequeaths  
a certain  
quantity  
of stock in  
the public  
funds to  
his execu-  
tors.

name, to produce that sum annually, then I give and bequeath to my said executors so much money as will be sufficient to purchase so much stock in one or other of the parliamentary funds of Great Britain, (according to the then current price thereof,) as will produce such annual sum, (which stock I do hereby direct my executors to purchase accordingly,) upon trust, that they, my said executors, do and shall cause the said stock to be transferred into their own names, jointly with the trustees or trustee under the settlement or contract made on my marriage with my present wife, J. S. ; and do and shall pay the interest or dividends arising from such stock to my said wife, (when and as the same shall from time to time arise and be received,) during her life, for her own use and benefit : and from and after the decease of my said wife, J. S., my will is, and I do hereby direct, that the stock hereinbefore by me given or directed to be purchased for her benefit, shall sink into, and become part of, my residuary estate, and shall go and be applied according to the dispositions hereinafter by me made of the same. Provided, and I do hereby expressly declare my will to be, that the provision made by this my will for my said wife, J. S., is by me intended to be, and to be accepted by her, in lieu, and in full satisfaction and recompence of all such benefit or provision, as I have, by such marriage settlement, or contract, provided or made, or covenanted, agreed, or contracted to provide, or make for her, either by way of annuity, or otherwise howsoever ; also, I give and bequeath to A. B., C. D., and E. F., the sum of 5000*l.* of lawful money of Great Britain, upon trust, that they, my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, place out and invest the same sum, and every part thereof, in their or his own names or name in the public stocks or funds of Great Britain, or on real or government securities in England, at interest, and do and shall stand and be possessed of and interested in such last-mentioned stocks, funds, or securities, upon the several trusts, and to and for the several ends, intents, and purposes, and with under and subject to the several powers and provisos hereinafter ex-

No. 11.

The stock to be transferred into their own names, together with the names of the trustees in the settlement or articles made on the testator's marriage.

To pay the dividends to his wife for her life, and after her death the principal to sink into, and become part of, the testator's residuary estate.

That the said provision for his wife shall be in lieu of her dower.

Testator then gives 5000*l.* to his trustees.

To invest the same in their names.

**No. 11.** pressed, and declared of and concerning the same, that is to say, upon trust, that they, my said executors and trustees, or the trustees, or trustee, for the time being, do and shall transfer, assign, and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my daughter, Mary Elizabeth L., (wife of J. L. C., of B., in the county of —,) by her present husband, (other than and except an eldest or only son, or an eldest daughter, entitled for the time being to the estate at B., aforesaid, which is entailed on the eldest child of their marriage) at such age, day, or time, if there be but one, and if more than one, then at such respective ages, days, or times, and in such parts, shares, and proportions, and subject to such conditions, restrictions, and limitations over, (such limitations over to be for the benefit of some or one of the said children) as my said daughter, M. E. L., at any time or times during her life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of, or purporting to be her last will and testament, or any codicil or codicils thereto, to be signed and published in the presence of, and attested by two or more credible witnesses, (whether she shall be covert or sole, and notwithstanding any coverture she may be under) direct or appoint; and in default of such direction or appointment, then upon trust, that they, my said executors and trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall transfer the said stocks, funds, or securities to such child, if there shall be but one, and the same shall be a daughter, on her attainment to the age of 21 years, or day of marriage, provided the same is contracted with the consent of my said daughter, M. E. L., or if a son, upon his attainment to the age of 21 years; and if there shall be more such children than one, then my will is, that the same stocks, funds, and securities, in default of such direction or appointment as aforesaid, be equally divided between or among them, share and share alike; the share or shares of such of them as shall be a


To transfer and assign the same last-mentioned stocks, &c. to the children of testator's daughter, M. E. L. according to the appointment of the said M. E. L.

And in default of appointment, among the children equally, with survivorship.

daughter or daughters, to be transferred to her or them respectively, on her or their attaining her or their age or respective ages of 21 years; or on the day or respective days of her or their marriage, which shall first happen, (provided such marriage shall be had with the consent of my said daughter M. E. L.); and the share or shares of such of them as shall be a son or sons to become vested in him or them respectively, on his or their attaining his or their age or respective ages of 21 years. Provided nevertheless, and I do hereby declare, that the appointment to be made by my said daughter M. E. L., of any such portion or portions as aforesaid, pursuant to the power hereinbefore given to her, shall not be invalidated or prejudiced by any omission or default of her appointment of the residue of such portions, under or by virtue of any such direction or appointment, made pursuant to the same power, but that any such child or children who shall be benefited by any such partial appointment shall have or be entitled to no further or other share of or in the unappointed residue of the said stocks, funds and securities, until every other child shall have received so much of such unappointed residue as will make his or her share or portion equal, if not otherwise so, to that of the child so taking under such direction or appointment as aforesaid. Provided, and I do hereby declare, that if any such child or children, being a son or sons, shall depart this life before he or they shall attain his age, or their respective ages of 21 years (without leaving lawful issue of his or their body or bodies) or being a daughter or daughters shall depart this life before she or they shall attain her age or their respective ages of 21 years, or be married, then and in default of any such direction or appointment as aforesaid, the share or shares of him, her, or them so dying, of and in the said stocks, funds, and securities, shall go and accrue to the survivors or survivor, or others or other of such children, and be equally divided between or among them, if more than one, share and share alike, and be transferable at such ages, days, and times as his, her, and their original portion or portions shall, by virtue of this my will, become transferable as aforesaid; and that in case of the death of any other of the

No. 11.

That any appointment of part shall stand good; but in case of a partial appointment, those who are the objects of it shall not come in with the rest, until they shall have so much of the unappointed residue as will make their shares equal.

**No. 11.**  said children (without having lawful issue before such accruing or surviving share or shares shall become vested as aforesaid) then every such accruing or surviving share or shares shall again become subject and liable to such further right, chance, contingency, or condition of accruer or survivorship, as hereinbefore is declared, touching the original portion or portions. Provided nevertheless, and I do hereby expressly declare, that in case any such child or children shall have left issue of his her or their body or bodies lawfully begotten, then my will is, that such issue shall have and be entitled to such share or shares of and in the said stocks, funds, and securities as his, her, or their deceased parent or parents would have had and been entitled to under this my will, if living, (such share or shares to be transferred to such issue, at such age or time as hereinbefore declared with respect to the transfer of their parents' shares). And upon further trust, that they my said executors and trustees, or trustee for the time being, do and shall pay and apply the dividends, interest and proceeds of the share or shares of such of the said children as shall not have acquired a vested interest in the share or shares hereinbefore provided or intended for him, her, or them, for or towards his, her, or their maintenance and education respectively, until the same respectively shall become transferable, until which period it is my will that my said daughter M. E. L. shall (if she shall so long live) have and be entrusted with the maintenance, education, and controul of her said children, and shall receive from my said trustees or trustee, such dividends, interest, and proceeds, for the purpose of enabling her to undertake, carry on, and defray the expences of the same. Provided, and my will is, and I do hereby expressly declare, that the said sum of 5000*l.* hereinbefore given and directed to be laid out for the benefit of the younger children of my said daughter M. E. L. by the said J. L. C., her present husband, is by me meant and intended, and shall accordingly be considered, and be accepted and taken, as and in lieu and full satisfaction and recompence of the sum of 5000*l.* which, by a bond executed by me previous to the marriage of my said daughter with her said husband, I have

In case of any dying andleaving issue, such issue to take the shares of their respective parents, at the same age and time as is before declared with respect to the shares of their parents.

The interest of their respective shares to be applied in maintenance.

That the daughter is to have the education and maintenance of her children.

The said sum of 5000*l.* to be received in lien and satisfaction of the like sum of 5000*l.* secured by bond, to be paid to the husband of his daughter on the marriage.

secured to be paid for the benefit of such younger children, according to his appointment, which appointment, by reason of the mental imbecillity of the said J. L. C., cannot now be made in a proper, reasonable, and effectual manner. And therefore, my will further is, and I do hereby accordingly direct and declare, that in case any claim or demand shall be made, and any proceedings at law or in equity shall be commenced or instituted, either by the said J. L. C., or by any other person or persons, in his name, or on his account or behalf, or claiming by, from, through, or under, or in trust for him, upon, or in respect of the said bond, or the said sum of 5000*l.* thereby secured, or any part thereof, or any interest to arise therefrom, my said executors and trustees, or the trustees or trustee for the time being, shall forthwith apply to the High Court of Chancery, for redress against such claim and demand, or adopt such proceedings as they shall be advised to pursue by their counsel, for resisting the same; the expences of obtaining which opinion of counsel, and of such application to the said court, and of all such other proceedings as shall be advised and adopted as necessary to resist such claim, I do hereby empower and direct my said executors and trustees, or the trustees or trustee for the time being, to pay and discharge out of my residuary personal estate. And my will further is, and I do hereby expressly order, that in case any person or persons, for whom or for whose benefit a provision is hereby made, or intended to be made, shall make or prosecute any claim or demand for or in respect of the said bond, or the said sum of 5000*l.* or any part thereof, then and from thenceforth such person or persons shall be utterly excluded and debarred from all benefit or provision under or by virtue of this my will, or of the dispositions therein contained. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter M. E. L., by the said J. L. C., her present husband, (other than and except an eldest or only son, and an eldest or only daughter, entitled, for the time being, to the said estate at B. aforesaid) who, being sons, shall depart this life under the age of 21 years, without leaving lawful issue of their, or any of their bodies, or being daughters, shall depart this

No. 11.

Which said marriage portion cannot now be paid to the husband, on account of his mental imbecillity. If any claim for such portion shall be set up and litigated, the trustees are to resist it, and defray the expences out of the residuary estate.

And if any body shall prosecute any claim upon the bond, this legacy to be void.



**No. 11.** life under that age and without having been married, then they, my said executors and trustees, or the trustees or trustee for the time being, shall stand possessed of, and interested in the said stocks, funds, and securities, or so much thereof as shall remain unappointed or undisposed of, as aforesaid, in trust for, &c.

Testator devises 800*l.* capital stock to his trustees, to pay the dividends to the eldest son of his daughter, until he shall come into possession of the estate settled upon him, by way of support in the interim; and when he shall come into possession of the settled estate, or if he shall die in the lifetime of his father, then the said capital to sink into the residue.

And I do hereby also give and bequeath to the said A. B., C. D., and E. F., their executors, administrators and assigns, the capital stock, or sum of 800*l.* five per cent. annuities, or so much of such other stock standing in my name at the time of my decease, as will be sufficient to produce the annual sum of 40*l.*; and in case I shall not, at the time of my decease, have sufficient stock standing in my name, to produce that sum, then I give and bequeath to my said executors and trustees, so much money as will be sufficient to purchase so much stock (according to the then current price thereof) as will produce such annual sum, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall cause the same to be transferred into their or his own names or name, and do and shall, until my grandson J. L., the eldest son of my daughter M. E. L., shall come into possession of the estate at B. aforesaid, (so entailed on the eldest child of the marriage of my said daughter and her present husband, as hereinbefore mentioned) pay the interest or dividends arising from the said stock, unto my said grandson J. L. and his assigns, and authorise and empower him and them to receive the same to and for his own use and benefit. Provided, and my will is, and I hereby direct, that from and after the decease of my son-in-law, the aforesaid J. L. C. whereby my said grandson J. L. will come into possession of the said estate at B., aforesaid, or be entitled to the receipt of the rents, issues, and profits thereof, or in case my said grandson shall depart this life in the lifetime of his said father, then from and after his decease, whichever shall first happen, the stock hereinbefore by me given, or directed to be purchased for the benefit of my said grandson, shall sink into and become part of the residue of my personal estate, and shall go and be applied according to the dispositions thereof hereinafter contained. And I do hereby give

and bequeath to each of my grand-daughters, S. and M., (over and above their share in the said sums of 5000*l.*, as two of the younger children of my said daughter, M. E. L., by the said J. L. C., her present husband, and over and besides such other shares and benefit as they respectively shall have or take under this my will) the sum of 1000*l.* of lawful money of Great Britain, to be an interest vested in them respectively on their respectively attaining the age of 21 years, or on their respective days of marriage, with such consent as hereinbefore mentioned, which shall first happen, nevertheless the actual payment thereof shall be postponed until after the decease of my said daughter, M. E. L. (who, during her life, shall have and be entitled to the interest and produce thereof). Provided, and I do hereby declare, that in case either of my said grand-daughters S. and M. shall depart this life before she shall attain her age of 21 years, or be married, then the sum of 1000*l.* hereinbefore given to her, (in the event of her attaining such age or being married) shall go and be paid to the survivor of my said two grand-daughters, to become vested and payable as hereinbefore is mentioned in respect to her original share.

No. 11.

An additional legacy to two grand-daughters.

And in case both my said grand-daughters S. and M. shall depart this life under the age of 21 years, and without having been married, then the said two several sums of 1000*l.* (hereinbefore given to them in the event of their attaining such age, or being married as aforesaid) shall sink into and become part of my residuary personal estate, and shall go and be applied according to the dispositions thereof hereinafter contained. And I do hereby give and bequeath to my said executors and trustees the like sum of 1000*l.* of like lawful money, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall lay out and invest the same in their or his own names or name, in or upon government or real securities in England, at interest; and do and shall during the minority of my natural son (1) J. S. now aged 13 years or thereabouts,

Gives 1000*l.* to be laid out by the trustees in the funds in their names, who are to apply the dividends in maintaining the testator's natural son.

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(1) Illegitimate children may take when born by their names of reputation, or by words clearly describing them, and the rule is,

**No. 11.** born at ———, on the 23d day of October 1789, now at school at ———, pay, apply, and dispose of the dividends, interest, or proceeds of the said last-mentioned stocks, funds and securities for and towards his maintenance and education, and in providing clothes and other necessities for him, in such way as my said trustees or trustee shall think advisable : and upon further trust, that when and so soon as my said natural son J. S. shall have attained the full age of 21 years, then that my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer and assign the said stocks, funds, and securities unto my said natural son, to and for his own use and benefit. Provided nevertheless, and I do hereby declare, that it shall and may be lawful to and for my said executors and trustees, or the trustees or trustee for the time being, to raise by and out of the said stocks, funds, and securities, upon which the said sum of 1000*l.* shall be so invested, any sum or sums of money, not exceeding in the whole the sum of ———*l.* for the purpose of placing out my said natural son J. S. apprentice, or otherwise for preferring or advancing him in or to any profession, business or employment, and to pay, apply, and dispose of the money so to be raised for any of those

And when he comes of age to transfer the stock to him for his own use.

With liberty to apply a certain sum as an apprentice fee, or for placing him out.

that they must be pointed out by clear description, for the law shews them no favour. And if a man devises to such natural children as shall be born of J. S., such children born after the making of the will shall not take, *Metham v. Duke of Devon*, 1 P. Wms. 529. nor even a child in ventre sa mere; for besides the objection on the ground of immorality, a bastard cannot take until he has gained a name by reputation, which cannot be before he is born. Thus, under a bequest “to such child or children, if more than one, as A. may happen to be enseint of by me,” a natural child, of which A. was then pregnant, was held incapable of taking. Though the Master of the Rolls, Sir W. Grant, seemed to think that a bequest to the natural child, of which a particular woman was enseint, without reference to any person as the father, might probably be good, as there was no uncertainty in the bequest. The case was decided upon the rule of law which does not acknowledge a natural child to have any father, even by reputation, before its birth. *Earle v. Wilson*, 17 Vez. Jun. 523.

purposes accordingly, in such way and manner as they or he shall judge most adviseable for his benefit. (Provided nevertheless, and I do hereby expressly declare, that no deduction or abatement shall be made out of the said sum of 1000*l.* for or on account of any bills that may, at the time of my decease, be due or be accruing, for or in respect of the maintenance, education, or clothing of my said natural son J. S.; but that such bills shall be defrayed, with the rest of my debts, out of my residuary personal estate, before any division thereof shall be made.

Provided, and my will is, and I do hereby declare, that in case my said natural son J. S. shall depart this life before he shall attain the full age of 21 years, then the said sum of 1000*l.* hereinbefore given and directed to be laid out for his benefit, or the stocks, funds, or securities wherein or upon which the same shall then be invested, or so much thereof as shall not have been applied or disposed of for the advancement or preferment of my said natural son, according to the authority hereinbefore contained and given for that purpose, shall sink into and become part of my residuary personal estate, and shall accordingly be applied upon the trusts hereinafter by me directed concerning the same. And I do hereby give and bequeath to my said wife, J. S. for her own use and benefit, all my household furniture, plate, linen, china, liquors, provisions, and other household goods and furniture that may be in and about my dwelling house at the time of my decease, save and except all books, papers, and manuscripts, it being my will and desire, and I do hereby direct, that such of the said books and papers as shall be necessary for settling or elucidating my affairs or concerns, shall be delivered to my executors hereinafter mentioned, and that such of the same books, papers, and manuscripts as shall not be necessary for that purpose, shall be delivered to my said daughter M. E. L., to be preserved or destroyed, or otherwise disposed of, as she shall think fit. Also I give and bequeath to my said wife J. S. the sum of 200*l.* for the purpose of providing mourning for herself and children; and also the sum of 20*l.* for mourning to her servants: also I give to my said wife five guineas for a ring for herself, and 7*l.* 10*s.* for six mourning rings, of

No. 11.

No part of such sum of 1000*l.* to be applied in paying any bills owing at testator's death, for the said son.

This sum, if not wanted, to sink into the residue.

Gives to his wife all his furniture, plate, linen, china, liquors, &c.

Such books and papers as may be necessary for settling or elucidating his affairs, to his executors. His other books and papers to his daughter.

200*l.* to his wife for mourning. 20*l.* for his servants' mourning. To his wife five gui-

**No. 11.** twenty-five shillings each, for any six persons she may think proper to give them to. Also I give to my aforesaid grandson J. L., my diamond ring, and to my grandson W. L. (second son of my said daughter, M. E. L.) or such other son of my said daughter, as at the time of my decease shall be the second son in seniority, my gold watch, or in case my said watch shall be worn out, lost, or destroyed, 30*l.* in lieu thereof: and I give to my nephew, R. C. D., 200*l.*, to be paid to him at my death. I give to each of my said executors, hereinbefore by me appointed, twenty guineas for their care and trouble in the execution of this my will; and also a ring of the value of twenty-five shillings: also I give to my servant, S. (for her care and attention to me,) twenty guineas, to be paid to her within one month next after my decease. And as to all the rest, residue and remainder of my personal estate and effects whatsoever and wheresoever, whereof or whereto, I or any person or persons in trust for me, shall, at the time of my decease, be possessed or entitled, (and not hereinbefore by me otherwise disposed of,) and whereof I have power to dispose by will, I do hereby give and bequeath the same unto my said executors, upon trust, that they the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, collect, get in, and receive such part thereof as shall consist of money, or securities for money, and do and shall convert into money such part thereof as shall not consist of money, or securities for money, and lay out and invest the same, and every part thereof, in their or his own names or name, in the parliamentary stocks or funds of Great Britain, or on real or government securities in England, at interest; and do and shall stand and be possessed of, and interested in, all such stocks, funds, or securities, upon the several trusts, and to and for the several ends, intents, and purposes, and with, under, and subject to the several powers and provisos hereinafter expressed and declared, of and concerning the same, that is to say, upon trust, that they my said executors or trustees, or the trustees or trustee for the time being, do and shall, during the natural life of my said daughter, M. E. L. pay the divi-

neas for a ring, and a sum for six rings to friends. Other specific bequests.

Testator gives all the rest and residue of his personal estate to the same trustees.

To convert the same into money, and place it out in the funds, or on government or real securities in England. And to stand possessed of the said stocks, funds, and securities upon trust, to pay the interest and divi-

dends, interests, and proceeds of the said last-mentioned stocks, funds, and securities, unto such person or persons only, and for such intents and purposes only, as my said daughter, M. E. L. shall, by any writing or writings under her hand, from time to time, notwithstanding her present or any future coverture, direct or appoint, and in default of such direction or appointment, do and shall pay the same, or so much thereof as she shall or may, from time to time, happen to make no direction or appointment of into the proper hands of my said daughter, M. E. L., for her sole and separate use and benefit, exclusively of her present or any future husband, who shall not intermeddle therewith, nor shall the same or any part thereof be subject or liable to the power, control, debts, or engagements of any such husband, but the receipts of my said daughter, M. E. L., and of such person or persons as she shall or may, from time to time, direct or appoint to receive the same, shall, notwithstanding her present or any future coverture, be good and effectual releases and discharges for the same, or so much thereof as in such receipts shall be expressed or acknowledged to have been received. Provided nevertheless, and my will is, and I do hereby expressly declare, that my said daughter, M. E. L., shall not have power to sell, assign, mortgage, or otherwise incur the said dividends, interest, and proceeds, or any part thereof, by anticipation, whilst in the hands of my said trustees or trustee; and from and after the decease of my said daughter M. E. L. (or in her life-time, if she shall direct the same by any deed or writing under her hand and seal, executed in the presence of, and attested by, credible witnesses,) upon trust, that they, my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer, assign and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my said daughter, M. E. L., whether by her present or any after-taken husband (other than and except an eldest or only son, or an eldest daughter, entitled for the time being to the estate at B—— aforesaid,) according to her appointment, by deed or will, in like manner, as hereinbefore declared, with re-

No. 11.

dends during his daughter's life to such persons as she shall, notwithstanding her coverture, direct and appoint.

And in default of appointment, into the proper hands of his daughter, for her sole and separate use.

Provide that his daughter shall not incur or anticipate the said dividends.

Power for the daughter to appoint the same either in her life-time, or after her decease.

**No. 11.** spect to the stocks, funds or securities, wherein or upon which the said sum of 500*l.* (hereinbefore given) shall be invested, and in default of such direction or appointment, then upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer, assign, and pay the same stocks, funds, or securities unto all and every the child and children of my said daughter M. E. L. whether by her present or any future husband, (other than and except an eldest or only son or an eldest daughter entitled as aforesaid) in like manner and with the like condition of survivorship and power of maintenance and education to and amongst all such children, and subject to all such powers, provisos, and restrictions as hereinbefore declared, with respect to the stocks, funds, or securities, wherein or upon which the said sum of 5000*l.* shall be invested. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter M. E. L. whether by her present or any future husband (other than and except an eldest or only son, or only daughter, entitled for the time being to the aforesaid estate at B.) shall depart this life before their said shares or any of them shall have become vested according to the directions of this my will, then my said trustees or the trustees or trustee for the time being shall stand possessed of, and interested in, all and every the stocks, funds, and securities, wherein or upon which my said residuary personal estate, or any part thereof, shall be placed out, or invested (or so much thereof as shall remain unappointed or undisposed of as aforesaid,) in trust, &c. Provided always, and my will is, and I do hereby declare that it may be lawful to and for my said trustees, or the trustees or trustee for the time being, (with the consent and approbation of my said daughter M. E. L. signified in writing under her hand, if living, and if she shall be then dead, then of the proper authority of my said trustees or trustee for the time being,) to sell and transfer all or any of the stocks, funds, or securities, wherein or upon which any part of my property shall be placed out or invested, in pursuance of this my will (but not without the consent in writing of my said wife J. S. if living, in case any of the stocks, funds, or secu-

And in default of appointment to and among her children equally, with survivorship, except an eldest son, or eldest daughter, entitled as aforesaid.

Power for the trustees to vary and transpose the securities.



ties, directed to be sold or transferred, shall form part of the security or provision hereinbefore devised for the benefit of my said wife during her life) and to lay out and invest the money to be produced by or from such sale or transfer, in or upon any other of the parliamentary stocks or funds of Great Britain, or on any other real securities in England, at interest, and from time to time (with the like consent and approbation as aforesaid,) to vary, alter, and transpose all such stocks, funds, and securities for others of the like nature, when and so often as it shall be desirable or convenient so to do; and that they my said trustees, or the trustees or trustee for the time being, do and shall stand possessed of, and interested in, all such new or other stocks, funds, or securities, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisos, declarations, and agreements as are hereinbefore declared or contained, concerning the stocks, funds, or securities, from the sale or transfer whereof such new stocks, funds, or securities respectively shall arise, or such of them as shall be then subsisting or capable of taking effect. Provided also, and my will further is, and I do hereby declare, that if my said trustees, or either of them, or any of their respective executors or administrators, or any future trustee or trustees to be appointed in the stead or place of them, or any of them as hereinafter is mentioned, or any of their respective executors or administrators, shall die, or be desirous of being discharged from, or decline to act, or become incapable of acting, in the execution of the trusts hereby in them reposed, or any of them, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for my said daughter M. E. L., by any writing or writings, under her hand and seal, (but having the consent of my said wife J. S., if living) to nominate and appoint any other person or persons to be a trustee or trustees in the stead and place of the trustee or trustees so dying, or desiring to be discharged, or declining or becoming incapable of acting as aforesaid, and that when and so often as any new trustee or trustees shall be so nominated or appointed as aforesaid, all the trusts, monies, stocks, funds, securities, and premises, which shall be

Clauses for  
changing  
trustees,  
and for  
their safe-  
ty and in-  
demnity.



then vested in the trustee or trustees so dying or desiring to be discharged, or declining to act, or becoming incapable of acting as aforesaid, either solely, or jointly with any other trustee or trustees, shall be thereupon with all convenient speed assigned and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust monies, stocks, funds, securities, and premises, and such new or other trustee or trustees; or if there shall be no continuing trustee of the same, then in such new trustees only, upon the same trusts and for the same intents and purposes as are hereinbefore expressed and declared of and concerning the same respectively, or such of them as shall be then subsisting or capable of taking effect; and that all and every such new trustees shall and may in all things act and assist in the management, carrying on, and executing of the several trusts herein expressed and contained, as fully and effectually to all intents and purposes, as if he or they had been originally appointed in and by these presents, or as the trustee or trustees, in or to whose place he or they shall succeed, might have done if living, and continuing to act in the execution of the said trusts. And I do appoint my said executors to be the guardians of my several grand-children, and of my said natural son J. S., during their respective minorities. And my will further is, and I do hereby declare and direct that my said executors and trustees, and such new trustees as may be appointed in pursuance of the power hereinbefore contained, and each of them, their and each of their executors, administrators, and assigns, shall be charged and chargeable only with and for so much of the said trust monies, and premises as they respectively shall actually receive; and that one of them shall not be answerable or accountable for the others or other, or for the acts, receipts, neglects, or defaults of the others or other of them, but each of them only for his own acts, receipts, neglects, or defaults; nor shall they, or any of them, be answerable or accountable for any banker, broker, or other person with whom or in whose hands any of the said monies may be placed for safe custody or otherwise, in the execution of any of the said trusts, nor for the insufficiency or deficiency of any stocks,

funds, or securities, in or upon which any of such monies may be invested, in pursuance of and in conformity to this my will, nor for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trust, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they my said trustees and executors, and such new trustees as may be so hereafter appointed as aforesaid, and each and every of them, their and each and every of their executors, administrators, and assigns, shall and may out of the monies, which shall come to their respective hands, by virtue of the trusts aforesaid, retain to and reimburse himself and themselves, and allow to his and their co-trustees and co-trustee, all costs, charges, and expences which they or any of them may respectively sustain, expend or be put unto, in or about the execution of the trusts aforesaid, or in anywise relating thereto. And lastly, I do hereby revoke all former and other wills by me at any time heretofore made.

No. 12.

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No. 12.

*A Will equally dividing the testator's whole substance between his two sons, being his only children, subject to a provision for his widow.*

THIS is the last will and testament of me, H. L. C. of ———, &c. Esq.; my soul I humbly recommend (1) to the

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(1) Of late years it has been the fashion, for there is a fashion even in the last acts of a man's life, to omit these solemn preambles. I confess myself an approver of them, as believing it to be useful

No. 12.

mercy of Almighty God, and I desire that my body may be interred without any unnecessary pomp or expence, in such spot as my executors may think convenient and proper for that purpose. In the first place, I charge all my estate and effects, of every description, with the payment of my debts, funeral and testamentary expences and such legacies as I shall hereinafter bequeath; and subject thereto, I give, devise, and bequeath unto my friends R. and S. all my messuages, farms, lands, estates, and hereditaments, with the appurtenances, wheresoever situate; and also all my personal estate and effects whatsoever and wheresoever, to and to the use of them the said R. and S., their heirs, executors, admi-

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to the surviving relatives of the testator to draw their attention to the tremendous consequences of the separation of soul and body, at a season of impressibility and reflection.

A gentleman has put into my hands a will of one of the Judges, made just after the restoration, the preamble of which seems to me to be affecting and interesting.

In the name of God, Amen, I, Thomas L., of, &c. one of the Barons of his Majesty's Court of Exchequer, finding myself oppressed with many infirmities of body, through age and suffering in these latter times, which puts me in remembrance that I have no long time to continue in this life, and that it is my duty to settle and dispose of that small remainder of estate which it has pleased God in his mercy and goodness to preserve to me, when so many virtuous men have lost all their possessions through the calamities of these unhappy times, do make this my last will and testament; first I commend my soul to the Lord of life, trusting that through the merits and satisfaction of his Son I shall obtain pardon for my many transgressions; and that having finished these days of misery and mortality, I shall inherit everlasting quiet; and I give my body to the earth, whereof it was made, to be decently interred, without any superfluous charge or expence, in humble hope that it will rise a glorious body at the general resurrection.

By the following extract from the will of the late Mr. Burke, it will be seen that his sentiments on this point coincided with those above expressed.

"First, according to the ancient, good, and laudable custom, of which my heart and understanding recognize the propriety, I be-

nistrators, and assigns, for ever, upon the trusts, nevertheless, and to and for the intents and purposes, and with, under, and subject to the several powers, provisos, limitations, and declarations hereinafter limited, expressed, and declared, of and concerning the same respectively, (that is to say) upon trust, that they or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, as long as they or he shall continue to receive the rents, issues, and profits, of any of my said houses, tenements and hereditaments, under the dispositions of this will, or any of them, do see that the same are kept in all substantial and necessary repair, and that the same or such as have usually been insured from damage by fire, be still kept insured to such value and amount as has been usual with regard to the same respectively, taking care that the expence of such repairs or insurances fall respectively upon the person or persons beneficially interested in the same under the provisions of this my will, and that in case any such loss or damage shall happen, that the money to be received upon or by means of such insurance or insurances, may be laid out in reinstating the same respectively, and do retain and apply so much of the rents and profits aforesaid, as shall be necessary in that behalf respectively; and subject and without prejudice to such the aforesaid trusts, upon trust, out of so much of the said rents and profits of all my said messuages and tenements as shall remain unapplied to the purposes aforesaid, and out of all the rest of my estates and effects hereinbefore devised and bequeathed to pay unto my wife E. C., or to such person or persons as she shall, by writing under her

No. 12.

Testator gives all his property to trustees.

Upon trust out of the rents and profits of his messuages and hereditaments to keep them in good repair and insured from fire.

And to lay out the money received upon the insurances in reinstating the premises destroyed or damaged.

Then to pay an annuity to his wife, to be

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“queath my soul to God, hoping for his mercy through the only  
 “merits of our Lord and Saviour Jesus Christ. My body I desire  
 “if I should die in any place very convenient for its transport thi-  
 “ther (but not otherwise) to be buried in the church, at Beacons-  
 “field, near to the bodies of my dearest brother and my dearest  
 “son, in all humility praying that, as we have lived in perfect  
 “unity together, we may together have a part in the resurrection of  
 “the just.”

**No. 12.** hand, appoint to receive the same, the yearly sum of 700*l.* of lawful money of Great Britain, as long as she shall live and continue my widow; and if she shall marry again, the said annuity of 700*l.* is to be reduced to 300*l.* of like lawful money; the said annuities of 700*l.* or 300*l.* as the case may happen, to be paid half-yearly by equal payments on every 24th day of June, and 25th day of December in every year, and a proportionate part of such half-yearly payment (if any) as shall be accruing, and not have actually accrued due, at the time of her decease. The first payment of the said yearly sum of 700*l.* to commence and be made to her on the first of those days which shall happen after my decease, and the first payment of the said yearly sum of 300*l.* to begin and take place on the first of those days which shall happen after such subsequent marriage of my said wife. And my will is with respect to the last-mentioned annuity or yearly sum of 300*l.*; that the same may be paid into the hands of the said E. C., or unto such person or persons as she shall appoint, exclusively of any such after-taken husband, who is not to intermeddle therewith, nor is the same or any part thereof to be subject in any manner to such husband's control, debts, or engagements. And I will and declare that the receipts of my said wife, or of such person or persons as she shall appoint to receive the said annuity, or the arrears thereof, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same or so much thereof as shall therein be expressed to have been received. And I further desire that my said trustees, or the trustees or trustee for the time being, out of the rents, issues, profits, and proceeds of all my said estates and effects, real and personal, but subject to all and every the trusts aforesaid, and to the annuity hereinbefore directed to be paid to, or to the appointment of, my said wife, do and shall pay unto my sister G. C., widow of, &c. or to such person or persons as she shall, by writing under her hand appoint to receive the same during her life, the yearly sum of 50*l.* of lawful money of Great Britain, by equal half-yearly payments, on the 24th day of June, and the 25th day of December, in every year, the first payment to commence and be made on the first of

**reduced on her marrying again.**

**And such reduced annuity to be paid to her exclusively of her husband, and not to be subject to his debts or engagements.**

**To pay other annuities.**

those days which shall take place after my death; and also do and shall out of the same rents, issues, profits, and proceeds, but subject and without prejudice to the aforesaid trusts, and to the said annuities, pay unto my niece C. L., or unto such person or persons as she shall, by writing under her hand, appoint to receive the same, during her life, the yearly sum of 70% of like lawful money, by like half yearly payments, and the first payment thereof to be made on the same day as before-mentioned in respect to the annuity given to my said sister G. C., and subject to the several trusts and annuities aforesaid, do and shall stand and be seised and possessed of all and every my aforesaid real and personal estate so devised and bequeathed to my said trustees as aforesaid, upon the trusts following, (that is to say) as to my said hereinbefore-mentioned hereditaments and premises, situate at L. in the county of K., and at B. and C., in the county of R. for the sole benefit of my eldest son T. C., his heirs and assigns for ever. And as to all the residue of my property hereinbefore devised and bequeathed as aforesaid, in trust for the sole benefit of my son J. C. his heirs, executors, administrators, and assigns, for ever. And I do hereby authorize and request the said trustees or trustee for the time being, so to pay and provide for the payment of the said several annuities hereinbefore made payable out of my general property as before-mentioned, as that the beneficial shares of my said two sons T. C., and J. C., be made contributory to and onerated with such payments in equal proportions, or as nearly equal as circumstances will permit, or can conveniently be done; and for facilitating such purpose and the general objects of my will, to keep separate accounts of the rents, profits, and proceeds of the said beneficial shares. And I do hereby also direct, that until my said sons shall respectively attain the age of 24 years, my said trustees or trustee for the time being, shall receive all the rents, profits, and proceeds of all my said estates, property, and effects, and out of the surplus which shall remain in their hands after discharging the said trusts and paying the said annuities, and all arrears thereof, pay and allow out of their said respective beneficial shares for the maintenance and education of my said sons, until they respectively shall attain the

No. 12.

And, subject to such trusts as aforesaid, to stand seised of the said estates and effects upon trust, as to certain premises, for the use and benefit of his eldest son, and as to all his other estates and effects, for the use and benefit of his younger son.

To contribute equally to the said annuities.

Separate accounts to be kept of the distinct shares.

Provision for the education

**No. 12.**

and support of his two sons, out of their respective shares.

Their education, confided to their mother and trustees, who are appointed guardians.

The universities and learned and liberal professions recommended.

age of 21, any annual sum, not exceeding 200*l.* per annum, and after they shall have attained the age respectively of 21 years, and until they shall respectively have completed the 24th year of their age, any annual sum, not exceeding 300*l.* according to the opinion of their guardians, of the wants of their respective situations. And I hereby appoint my said wife, E. C., together with the said R. and S., the guardians of my said children, and commit wholly to them, and their love and prudence, the education and management of my said two sons, only that to either or each of my said sons, electing to pursue one of the three learned professions, divinity, law, or physic, and with their or his own consent and express inclination, fixed as a student in either of our two English universities, I request my trustees or trustee, for the time being, to advance and pay over and above such suitable allowance as aforesaid, the gross sum of 100*l.* in order to enable him or them to purchase a competent collection of books, which sum of money I request the said guardians of my said children, to see laid out in the purchase of such books only, as are proper and safe to be perused and studied by them. And I desire it to be understood to be my wish and desire, that my said sons should follow liberal and learned professions, and receive an academical education at the university of Oxford or Cambridge. And I declare my will to be, that my said sons, as and when they shall severally have attained the age of 24 years, shall respectively become entitled to receive the entire rents, profits, and proceeds of their respective shares of the said trust property, to which they will be entitled, under and by virtue of this my will, subject, and without prejudice to the interests, charges, annuities, and trusts hereinbefore mentioned. And I do hereby direct that as and when my said sons shall severally have completed the said age of 24 years, if the said several annuities hereinbefore bequeathed shall, previous to that time have ceased to become payable, or as soon after their severally attaining that age as the aforesaid annuities shall cease to become payable under this my will, the said R. and S., or the survivor of them, or the heirs, executors or administrators of such survivor, shall convey, assign, transfer, pay and make over, by proper and effectual

conveyances, transfers, payments, and assurances in the law, to such of my said sons as shall have so completed the 24th year of his age, all the legal estate and interest of and in his share of the surplus of my said real and personal property, estate, and effects, remaining after the discharge of the aforesaid trust, and payment and satisfaction of the said several annuities, charges, and allowances, in the manner hereinbefore mentioned. And furthermore, my will is, that when, and as soon as either of my said sons shall have completed the 24th year of his age, if he shall consent to give such security, and execute such deeds and assurances, as to the satisfaction of the said trustees or trustee, for the time being, shall sufficiently bind and secure the regular payment of his proportional contribution towards the said several annuities hereinbefore bequeathed, the legal estate of and in the said several species and kinds of property, constituting such his said share above given to him, or intended so to be, (subject, and without prejudice to any of the hereinbefore mentioned beneficial interests and charges,) shall forthwith be transferred and made over to him, his heirs, executors, administrators and assigns, absolutely for ever. And I do hereby further declare my will to be, that if either of my said sons shall happen to depart this life, before he shall attain 24 years of age, (2) and without having been married, all his aforesaid

No. 12.

And when the sons shall have attained 24, then upon their giving security for the payment of the annuities, their shares to be conveyed to them absolutely.


In case either dies before 24, his share to survive.

(2) If real or personal property be given to A., and if A. die before a certain age, then to B., upon A.'s dying before the age mentioned, in the life of the testator, the devise or bequest does not lapse, but will operate immediately on the testator's death, for the benefit of B. *Northey, v. Strange*, 1 P. Wms. 342. Upon the same principle of construction, where property is given to several persons, as tenants in common, the clause, extending the bounty to survivors, is of use to prevent a lapse; and the word survivors will not make the interest a joint tenancy, if the intent to make a tenancy in common appear by the will; thus, if the devise be to A., B., and C., to be *equally divided between them*, and the survivors and survivor of them, it is a tenancy in common, by virtue of the words *equally between them*, and the words *survivors and survivor of them*, are to be understood of such of them as shall be living at the testator's death. See 1 P. Wms. 7. note.

Of the interest of the devisee in remainder, where the devisee for life dies before the testator.

The limitation over to the survivors, after a devise to persons as tenants in common, prevents a lapse.




**No. 12.**  beneficial estate and interest, given to or intended for him by this my will, remaining after the full discharge of such payments and arrears, as are hereby charged upon the same, or the same is hereby in anywise made liable to, and subject to such of them as shall still be payable thereout, or charged thereupon, shall go and belong to the surviving brother, and be subject to such and the same provisos, restrictions, and powers, to which all my said property and effects have hereinbefore been made liable. And in case both my said sons shall depart this life before they shall attain the 24th year of their age, and unmarried, my will is, that the said R. and S., or the survivor of them, or the heirs, executors, and administrators of such survivor, do and shall, with the consent of the said E. C., if she be then living, and if she be dead, of their or his own proper authority, sell and dispose of all the said property hereinbefore devised to them, both real and personal, either together, or in parcels, by public auction, or private contract, for the best price or prices in money, which can be reasonably obtained for the same, and convey the same accordingly. And I will and declare, that the receipt, or receipts, of my said trustees, or the trustees, or trustee, for the time being, shall be a sufficient discharge, or discharges, to the purchaser or purchasers thereof, or of any part thereof, for the money for which the same, or any part thereof, shall be so sold as aforesaid, and such purchaser, or purchasers, his, her, or their heirs, executors, administrators, or assigns, or any of them, shall not be answerable for any loss, non-application, or misapplication of such purchase-money, or any part thereof. And I give and bequeath the money arising from such sale or sales, to the said R. and S., their executors, administrators, and assigns, upon trust that they, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, and do and shall vary and transpose such stocks for other securities of the like nature, when and so often as it shall seem meet to them, and do and shall pay the interest and dividends of the same unto my said wife E. C., as long as she shall live, or to such person or persons as she shall appoint to receive the same, and from

And in case both sons shall die before 24, the trustees are to sell all the trust estates and effects, and vest the produce in the funds, and stand possessed thereof upon trust, to pay the interest and dividends to his wife for life, and after her death, to transfer and pay the principal to such persons, in such shares, &c. as testator shall appoint, and in default of appointment to and among testator's next of kin.

and immediately after her decease, upon trust, that they, the said trustees, or the trustees, or trustee, for the time being, do and shall pay or transfer all such principal monies, stocks, funds and securities, unto such persons, in such parts, shares, and proportions, at such days and times, and with, under, and subject to such powers, restrictions, limitations over, and conditions, as I may hereinafter direct or appoint in any future will, codicil, testamentary paper, or other writing under my hand; and in case I shall make no such direction or appointment in respect thereof, or shall dispose only of part thereof, then my will is, that my said trustees, or the trustee for the time being, do and shall dispose of all such the said principal monies, stocks, funds and securities, or so much thereof as shall remain unappointed and undisposed of by me, by any subsequent will or codicil, or testamentary paper, or other writing as aforesaid, to and amongst my nearest kindred, precisely in the manner in which the statute made for the distribution of intestates' effects, would have disposed of my personal property in case of my dying wholly intestate. And I give to the said R. and S., whom I also constitute and appoint executors of this my last will and testament, full power, with the privity, consent, and approbation of my said wife, if she shall be living, and if she shall be dead, then of their own authority to sell and dispose of any part of my said personal estate and chattels real, for the most money that can be obtained for the same, if they shall deem such sale or disposal to be for the benefit of my said personal estate, until my said son, J. C., who is to become entitled thereto under this my will, shall have attained his age of 24 years. And I request them, as such executors, to call in any debts due to me upon bond, or otherwise, but so nevertheless as to give a reasonable time to my bond debtors to discharge the same respectively, provided the interest be regularly paid, and the principal be not immediately wanted for the purposes and provisions of this my will, or some, or one of them. And my will is, that all such part of my personal estate, and the growing proceeds thereof, as likewise the rents, issues, and profits, of all my real and leasehold estates, remaining in the hands of my said trustees, or the trustee, for the time being, after discharging

Trustees empowered to sell and dispose of any part of the personal estate which it may appear to them to be for the benefit of the younger son to dispose of, until he shall have attained the age of 24, and have the full possession of his share under the will. The proceeds to be laid out in stock, to accumulate till the son is entitled.

**No. 12**  all the said several trusts, and keeping down the said several annuities above granted, as shall not be wholly in the disposition of one of my said sons, by virtue of the beneficial estate and interest hereinbefore given to him, until the same shall be in the actual possession and disposition of my said sons respectively, by virtue of the provisions of this my will, or some or one of them, shall be invested and laid out in the purchase of stock, in such of our public and parliamentary funds, as the said trustees, or trustee shall think most advantageous and desirable, and be permitted, and caused to accumulate in the nature of compound interest, until the capital shall, by virtue of some or one of the aforesaid provisions of this my will, be respectively transferable to the persons beneficially entitled to it, under the above dispositions, for the benefit of such his estate and interest; provided always, that the said trustees, or trustee, as aforesaid, do and shall keep distinct and separate accounts of the stock so to be purchased as aforesaid, so as to correspond with, and relate to the distinct titles and shares of my said sons, under my will as aforesaid. And I further desire and direct, that if either of my said sons, having completed the 21st year of his age, shall be in treaty for a marriage, becoming his condition, education, and family, and such as shall be fully approved of by my said wife, if she be then living, and the other guardian or guardians appointed by this will, and if such guardians shall be then all dead, by the said trustees, or trustee, for the time being, he may be enabled, notwithstanding he may be under the age of 24, by the said trustees, or trustee, to make a suitable legal settlement of all or some part of his share of the real or personal property to which he will be entitled, under this my will, upon such intended marriage, the terms and provisions of which settlement shall be in his own discretion: provided only that he enters into such bonds and covenants, and executes such reasonable other assurances, as shall be deemed by the said trustees, or trustee, as aforesaid, sufficient to bind and secure to the persons entitled to any annuities or benefits out of, or charged upon his said share or division of my testamentary property, the full and regular payment and satisfaction thereof. And it is my will, that upon such marriage,

If either of his sons shall be in treaty for a suitable marriage before 24, with the consent of his mother and guardians, trustees are to enable him to make a suitable settlement.

with such consent, and at such age as aforesaid, of either of my said sons, he shall have all the benefit and privileges which have hereinbefore been provided for him on his attaining the age of 24; and that the whole property given to him by this my will, shall, upon the said annuities and charges being secured, as aforesaid, ultimately and absolutely vest in him, discharged of the said contingency of survivorship in the other brother. And I declare my will to be, that if my said wife, E. C., shall insist upon receiving her jointure of 300*l.* per annum, which was settled upon her by our marriage settlement, bearing date the 19th day of February, 1772, and secured by way of rent charge upon some of the hereditaments and premises above devised to my said trustees, upon the trusts hereinbefore-mentioned, she shall take no benefit under this my will; but the same, as far as respects any provision for her, or disposition in her favour, shall be void, and of no manner of effect: and in the event of her attempting to enforce her claims to such jointure, or any part thereof, by any of the powers or remedies given to her, or her trustees, by the said settlement for that purpose, I do direct, that in every such case the trustees, or trustee, for the time being, under this my will, do and shall, instead of paying to my said wife the annuity, or annuities, hereinbefore provided for her, or any part thereof, make such disposition of the rents and profits of my said estates, hereby devised to them, and which they are hereby empowered to receive, as that my eldest son, for whose share the estates charged with the said jointure are hereinbefore intended, may receive a complete indemnification, and the just proportion between my two sons, as to the benefit to be derived to them, under this my will, may be equally preserved and maintained. [The proper clauses for the safety and indemnity of the trustees.]

And, lastly, I do hereby solemnly revoke all former wills and testaments at any time heretofore by me made, and declare this only to be my last will and testament.

No. 12.

If testator's wife should claim her settled jointure then she is to take no benefit under the will.

## No. 13.

*A Will, comprising directions for a Settlement of freehold, copyhold, and leasehold estates, with various limitations and provisos, by way of annuities and rent charges ; containing also various bequests of chattels, and sums of money.*

His furniture, plate, pictures, books, &c., to his wife absolutely.

Confirms an estate before settled upon her, and adds a further life-estate on other premises.

I, J. W., of ———, do make this my last will and testament, in manner and form following : I desire to be decently interred at ———, at the discretion of ———, my executors hereinafter named ; and I give and bequeath unto my wife, A., all my household goods and furniture, plate, jewels, watches, linen, china, pictures, books, and wearing apparel of what nature or kind soever, as well at my town residence, as at my residence at ——— aforesaid ; and also all my coach-horses, saddle-horses, coach, chaise, and other carriages, and the harness, saddles, bridles, furniture, and other things belonging, and appurtenant thereto, together with the live and dead stock, farming utensils, and implements of husbandry whatsoever, which shall be at, in, or upon, or about my estate at ——— aforesaid, at the time of my decease, to and for her own proper use absolutely, for ever ; also I confirm to her, my said wife, the surrender made to her use, for life, of my copyhold estate at ———. And I do hereby give and devise unto her, my said wife, all my freehold estate, with the appurtenances at ———, and ——— aforesaid, to hold the same to and for the use of her, my said wife, A., and her assigns, for and during the term of her natural life, (if she shall so long continue my widow,) she keeping the same in repair, and


paying the quit rents (if any) and taxes : and I give to her, during the continuance of her respective estates, full power to grant leases of the said freehold premises, and also of the said copyhold premises, so far as the custom of the manor will allow, for any term or terms, not exceeding three years, in possession, and not in reversion, so as the best improved rents be reserved incident to the reversion, without taking any fine, and the lessees be not made punishable for waste, and so as there be contained therein a proviso for re-entry for non-payment of the rents thereby reserved, and so as such lessees do execute counterparts of such leases, and covenant for the due payment of such rents. And as to, for, and concerning the remainder or reversion of the said copyhold estate, so surrendered to the use of my said wife for her life, expectant on her decease ; and as touching and concerning the said freehold premises hereinbefore given to her during her widowhood, from and immediately after her decease, or second marriage, which shall first happen, and also as to, for, and concerning all other my manors, messuages, farms, lands, tenements, and hereditaments, situate and being in the said county of ———, and in the counties of ——— and ———, or elsewhere, freehold, copyhold, and leasehold, whether in possession; reversion, remainder, or expectancy, whereof I have power to dispose, I give, devise, and bequeath the same, and all my estate and interest therein respectively, unto and to the use of my wife, A., and my friends ——— and ———, according to the nature of the same estates respectively, upon the trusts, nevertheless, and for the intents and purposes, And with, under, and subject to the powers, provisos, and declarations hereinafter expressed and declared of and concerning the same respectively, (that is to say) upon trust, that they, the said trustees, or the survivor or survivors of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall, by sale or mortgage, demise, or other disposition of the several estates and premises, or a competent part thereof, or by, with, and out of the rents, issues and profits to arise therefrom in the mean-time, or by all or any of the aforesaid, or by such other ways and means as to them, him, or her shall seem meet, raise and levy such sum or sums of money as shall

No. 13.

With a  
power of  
leasing.

All the residue of his estates, of all kinds to trustees.

To raise, by sale or mortgage, such sums as shall be sufficient to make good any deficiency of the personal estate, in paying the legacies, debts, &c.

**No. 13.**  be sufficient to make good the deficiency of my personal estate, not specifically bequeathed, in answering and satisfying my debts, legacies, annuities, and funeral and testamentary charges: and for facilitating such sale or sales, mortgage or mortgages, I will and declare, that the receipt or receipts of the said ——— and ———, or the survivors or survivor of them, or the heirs, executors, administrators or assigns of such survivor, shall be a sufficient discharge or discharges for the purchase or mortgage money, agreed to be paid or advanced either by way of purchase or loan, for or upon my said several estates and premises, or any part or parts thereof respectively; and the person or persons paying or lending the same, his, her, or their heirs, executors, administrators or assigns, shall not be liable to answer any loss, misapplication, or nonapplication thereof respectively: and, subject and without prejudice to the aforesaid trust, I will and direct that the said trustees, or trustee for the time being, do and shall stand, and be seised and possessed of my said several freehold, copyhold, and leasehold estates and premises, or so much thereof respectively, as may remain unsold, upon the following trusts, (that is to say) as to my freehold estates and premises, upon trust, to convey, settle, and assure the same, subject to any such mortgage or mortgages as may be so made as aforesaid, to the uses herein-after-mentioned, or so many of them as at the time of such settlement shall be subsisting or capable of taking effect, that is to say, to the use, intent, and purpose that my said wife may receive thereout one annuity or yearly rent-charge of ——.l. clear of all taxes and without deduction, for her life, to and for her own sole and separate use and benefit, (over and above all other provisions which I have made for her) but, nevertheless, I do hereby declare, that the provisions hereby made or intended for and in trust for my said wife, shall be accepted by her as and for her jointure, and in lieu and full satisfaction of all dower and thirds, or free bench to which she is, can, or may, or otherwise might be, entitled out of all or any of my estates at the common law, or by custom: and to the use and intent that B., the wife of ———, may receive one annuity or clear yearly rent-charge of ——.l. for her life, clear of taxes and without deductions,

Their receipts to be discharges.

To remain seised and possessed of such and so much of the said estates as should not be sold for the said purposes, upon trust, to convey and settle the same to the uses after-mentioned, viz. to the intent that his wife may receive an annuity over and above the provisions already made for her, to be in lieu of dower.

To the use and intent that B. may receive an annuity of ——.l.

for satisfaction of the like yearly sum to the payment of No. 13. which to her, I am liable : and to the use and intent that my said trustees and their heirs may receive thereout, upon the trusts hereinafter expressed, the following annuities or yearly rent charges, clear of taxes and without deductions, for the life of Jane W., daughter of ———, that is to say, so long as she shall be under the age of 21 years, and unmarried, the clear annuity or rent-charge of ———*l.* and after she shall attain the said age, then the clear annuity or rent-charge of ———*l.* so long as she shall continue unmarried, and after her marriage, the clear annuity, or yearly rent-charge of ———*l.* for the remainder of her life ; in trust, to apply the said annuity or rent-charge of ———*l.* during its continuance, for or towards her maintenance and education, the said annuity of ———*l.* during its continuance, to her for her absolute use, and that of ———*l.* during its continuance into her proper hands, or to her appointee or appointees in writing under her hand, to the intent that the same may be for her sole and separate use, exclusively of her husband for the time being, and may not be subject to his power or control, debts, or engagements, and for which the receipts of her, or her appointee or appointees, shall be effectual discharges, notwithstanding her coverture. And to the use and intent that the several other persons hereinafter named may receive out of the same premises the several annuities or yearly rent-charges hereinafter-mentioned, for their respective lives, clear of taxes and without deductions, that is to say, my sister, J. R., one annuity or yearly rent-charge of ———*l.* for her life ; II. D. (husband of my late sister, M. D.) one annuity or yearly rent-charge of ———*l.* for his life ; my niece M. A. (daughter of my said late sister) one annuity or yearly rent-charge of ———*l.* for her life ; my niece E. B. (daughter of my late sister E. S.) one annuity or yearly rent-charge of ———*l.* for her life ; E. B. (son of my said niece E. B.) one annuity or yearly rent-charge of ———*l.* for his life ; my niece J. M. (the wife of T. M.) one annuity or yearly rent-charge of ———*l.* for her life ; my niece I. M. (the wife of J. M.) one annuity or yearly rent-charge of ———*l.* for her life ; E. B. (my wife's brother) one annuity or yearly rent-charge of ———*l.* for his

And to the further use and intent that the trustees may receive an annuity for the life of J. W. (that is to say) during her minority ———*l.* from that time till marriage ———*l.* and after her marriage ———*l.* ; to apply the said annual sum of ———*l.* during its continuance for her maintenance ; the second sum of ———*l.* during its continuance to be paid to her for her absolute use, and the third sum of ———*l.* to be paid to her for her separate use, exclusively of her husband.

And to the use and intent that the several other persons after-named, may receive the several annuities or rent charges after-mentioned for their respective lives, (that is to say)



**No. 13.** life; A. B. (my wife's sister) one annuity or yearly rent-charge of —*l.* for her life; E. A. (daughter of N. J. deceased) one annuity or yearly rent-charge of —*l.* for her life; E. W. (my late housekeeper) one annuity or yearly rent-charge of —*l.* for her life; and J. P. one annuity or yearly rent-charge of —*l.* for his life; all the said several annuities or yearly rent-charges hereinbefore directed to be paid out of, and charged upon, the said estates and premises in such settlement to be comprised, to be paid to the said annuitants respectively, by equal quarterly payments, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year; the first quarterly payment of the said annuities respectively to begin and be made on the first of the said quarter days that shall happen next after my decease, with powers of distress and entry upon, and perception of the rents and profits of the same premises, to be limited and reserved to the said several annuitants in the usual manner, for better securing and compelling the payment of the said several annuities or yearly rent-charges.

And subject thereto, and to the powers and remedies for recovery thereof, to the use of testator's son and sons successively in tail male, remainder to his daughters as tenants in tail with cross remainders.

Remainder to the heirs of his own body, Remainder to W. W. for his life, and his children in strict settlement.


And as to the said estates and premises so to be charged, and subject thereto, and to such powers and remedies for recovery thereof as aforesaid, to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of my body, lawfully issuing, (whether born in my life-time or after my death) severally and successively, and in remainder one after another, as they shall be in priority of birth, in tail male; remainder to the use of all and every the daughter and daughters of my body, lawfully issuing; (whether born in my life-time or after my death) in tail general, to take as tenants in common if more than one, with cross remainders among them as tenants in common if more than one, in like tail general; remainder to the heirs of my body, lawfully issuing; and for default of such issue, to the use of W. W. (son of W. W. late of ———, deceased) and his assigns, for his life, without impeachment of waste; remainder to the use of my said trustees and their heirs, during his life, in trust, by the usual ways and means, to preserve the contingent uses and estates, in such settlement after to be limited, from being defeated or destroyed, but to

permit him and his assigns to receive and take the rents, issues, and profits of the said estates and premises, during his life, to his and their own use; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said W. W. the son, severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my said trustees and their heirs, during the life of my nephew J. J. upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of my said nephew J. J. severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my said trustees and their heirs, during the life of my said niece, J. M. upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said J. M., severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of L. W., upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said L. W. severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of J. L., upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said J. L., severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my trustees and their heirs, during the life of my said sister, J. T., upon the trusts hereinafter expressed and declared of and concerning the same; remainder to the use of all and every the daughters and daughter of the said J. T. lawfully begotten, or to be begotten, and of all my said

No. 13.

Remainder to the use of the trustees, during the life of J. J. upon the trusts after mentioned, and to the children of J. J. in succession in tail male.

Same limitations to others and their families.

**No. 13.**  brothers and sisters, lawfully begotten or to be begotten, in tail general, to take as tenants in common, if more than one, with cross-remainders among them as tenants in common, in like tail general; remainder or reversion to the use of my own right heirs. And as to the several and particular uses and estates hereby directed to be limited in such settlement, in remainder to the said trustees and their heirs, during the respective lives of the said J. J., J. M., L. W., J. L., and J. T., such uses and estates shall therein be declared to be so limited to the said trustees and their heirs, during the continuance of the same respectively, in trust, not only to preserve by the usual ways and means, the several contingent remainders therein to be limited, but to manage and improve the said estates and premises, in such manner as to them the said trustees, or the trustees or trustee for the time being, shall seem meet, and to receive the rents, issues, and profits thereof, and to pay or apply the same, or so much thereof as shall remain, after retaining or discharging the expences of repairs and improvements, and all taxes and other necessary outgoings, and the poundage, salaries, or wages of such person or persons, agent or agents, as they, he, or she may think fit to appoint or employ, to oversee, manage, and improve, and receive the rents, issues and profits of the said premises, to or for the benefit of such person or persons, as for the time being shall, under the limitations in such settlement, be entitled to the next estate, of and in the said manors and premises therein comprised, expectant on the particular use or estate, for the time being, vested in possession in my said trustees or their heirs, in trust as aforesaid, but subject to a proviso to be inserted in such settlement, that if the person or persons for the time being, entitled to such next estate, or any of them, be a minor or minors, and unmarried, then during the period that such person or persons, or any of them, shall be a minor or minors, and continue unmarried, such part of the net rents, issues, and profits of the said premises as such unmarried minor or minors would be entitled to, if he, she, or they was or were married, or adult, shall be disposed of by the said trustees or trustee for the time being, in the following manner, that is to say, any such yearly sum or

And as to the uses and estates directed to be limited in such settlement to the said trustees, during the lives of the said J. J., J. M., L. W., J. L., and J. T. in trust, not only to preserve the contingent remainders therein to be limited, but to manage and improve the estates for the benefit of the persons next entitled.

Directions for the disposal and application of the

sums, or such part thereof, as they, he, or she, in their, his, or her discretion shall think necessary, not exceeding —*l.* per annum, shall be applied for or towards the maintenance and education of such minor, or for each of such minors, if more than one, until he or she shall attain the age of fourteen years, and after that age, and until he or she shall attain the age of eighteen years, or shall be married, any yearly sum or sums, not exceeding —*l.* per annum for such minor, or each such minor, and after the age of eighteen years, and until he or she shall attain the age of 21 years, or be married, any yearly sum or sums not exceeding —*l.* per annum, for such minor, or each such minor; and the surplus of such net rents and profits as such unmarried minor or minors would, if married or adult, be entitled to, remaining unapplied for the last-mentioned purpose shall, during such period, be considered as constituting part of my residuary personal estate, and be subject to the disposition hereinafter made thereof, and to all the trusts and powers in this my will contained respecting the same. And I will and direct that there shall be inserted in such settlement, a power or proviso enabling the said W. W., as and when he shall be in the actual possession or entitled to the rents, issues, and profits of the said estates and premises so to be settled by deed or will, to grant, limit, settle, or appoint to, or to the use of, or in trust for, any woman or women, whom he shall happen to marry, (and that either before or after such marriage,) for and during the natural life or lives of such woman or women respectively, for her or their jointure or jointures, and in bar of her or their dower, to take effect immediately after his decease, any annual sum or yearly rent-charge, annual sums or rent-charges, not exceeding —*l.* by the year, tax-free and without any deduction, to be issuing out of, and to be charged and chargeable upon all, or any part of the said estates and premises, with such powers and remedies for recovering the same when in arrear, and to create and limit such term or terms of years, for raising and better securing the same, as to him shall seem meet. And it is also my will, that in such settlement there shall be inserted a power or powers, enabling the said W. W., and also the trustees

No. 13.

rents and profits, in case the persons so next intitled shall be minors.

To apply certain sums for their maintenance, varying with their respective ages.

The surplus of the said rents and profits in the mean time to fall into the residue of testator's personal estate.

Settlement to contain a power for the tenant for life to jointure any woman he may marry.

And also a leasing power.

- No. 13.** or trustee for the time being under such settlement, as and when they shall respectively be in the actual possession, or entitled to the receipt of the rents and profits, of my said manors, hereditaments, and premises, under the limitations therein contained, and also during the minority or minorities of any such child or children as may be entitled to the freehold and inheritance thereof, under such limitations as aforesaid, to make leases of all or any part of the said premises, for any term not exceeding 21 years in possession, and not in reversion, or by way of future interest, so as there be reserved in every such lease the best and most improved yearly rent, to be incident to the immediate reversion of the premises so to be demised, that can be reasonably had or gotten for the same, without taking any fine, premium or foregift for the making thereof, and so as there be contained in every such lease a condition of re-entry on non-payment of the rent thereby to be reserved, and so as the lessors execute counterparts thereof, and do thereby covenant for the due payment of the rents, to be thereby reserved, and be not made dispunishable for waste. And it is my will, that in such settlement there shall be inserted a proviso, condition, or clause, enjoining the issue male of my said niece J. M. within six calendar months next after such issue male shall come into possession of the said estates and premises, under the limitations in such settlement, to assume, take, and use the surname of W. only, and to write and sign that surname only in or to all acts, deeds, and instruments, and on all other occasions, and for determining the estate tail of such issue, refusing or neglecting to comply with such condition, and limiting the said estates and premises over to those who may be next in remainder expectant on such estate tail, under such settlement, or who would be entitled to the possession of the said premises, under the limitations in such settlement, in case the tenant in tail male so refusing or neglecting, were actually dead, without issue male. And my will further is, that such intended settlement shall contain a proviso that in case any of the trustees therein named, or any succeeding trustee or trustees in their or any of their place or places (whether introduced into the trusts therein contained by nomination or appoint-

Settlement to contain a proviso for obliging the person taking under the limitations to use the testator's surname.

Settlement to contain a proviso for empowering a change and substitution of


ment as hereinafter mentioned, or by representation of any deceased trustee or trustees,) shall die, or desire to be discharged from, or refuse or neglect to act, or become incapable of acting in the execution of such trusts, or any of them, it shall be lawful for the surviving, or other trustees or trustee for the time being (whether he, she, or they, may have been created a trustee or trustees, by nomination or appointment, or have become so by representation as aforesaid,) by deed or instrument, under hand and seal, attested by two or more witnesses, to nominate and appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying, desiring to be discharged, or refusing or neglecting to act, or becoming incapable of acting as aforesaid; and a clause making the usual provision for vesting the trust estates, real and personal, according to such nomination or appointment, and for giving the same its full effect, and enabling the new trustees or trustee to execute every trust and power which the old trustee or trustees might have done if such appointment had not taken place, either alone or in conjunction with the continuing trustee or trustees (if any) as the case shall happen. And also the usual clause for the indemnity of the trustees or trustee therein named, their heirs, executors, administrators and assigns, and for enabling them to act with safety in the execution of the trusts of such settlement, and such other clauses as are usual in settlements of the like kind. And as to, for, and concerning my said copyhold and leasehold estates and premises, or so much thereof as may remain unsold, for making good the deficiency of my personal estate not specifically bequeathed, in answering my debts, legacies, and funeral and testamentary charges, I will and direct that the said trustees, or the trustees or trustee for the time being, do and shall stand seised and possessed of the same respectively, (subject to any such mortgage or mortgages as may be made thereof as aforesaid,) upon such trusts, and for such intents and purposes as are hereinbefore directed to be limited or expressed, of and concerning the said freehold manors and premises therein to be comprised, and with, under, and subject to such and the same powers, provisos, conditions, limitations, and declarations as are di-

No. 13.

trustees to  
be made  
from time  
to time.

And the  
usual  
clauses of  
safety and  
indemnity  
to the trust-  
tees.

Trustees to  
stand seised  
and possessed  
of the copy-  
hold and  
leasehold  
estates upon  
correspondent  
trusts.

- No. 13.**  rected to be contained therein, concerning the same freehold manors and premises, or as near thereto as can or may be, and the rules of law and equity and the different natures of the estates and tenures will admit. Provided, that it shall be lawful for my said trustees, their executors, administrators, and assigns, as and when they in their discretion shall think proper, or see occasion, to renew the lease and leases of all or any part of my leasehold premises, and pay the fines and fees, and other expences necessary to be paid for such renewal or renewals, out of any monies which may be in their hands by virtue of this my will, and to rebuild or repair all or any of the messuages or tenements, to be demised by such renewed lease or leases, (if such renewal shall be obtained on terms of rebuilding or repairing,) and to pay the expences of such repairing or rebuilding, in like manner as I have directed with respect to the expences of such renewals aforesaid; all which renewed leases shall be vested in them the said trustees, their executors, administrators, and assigns, upon the same trusts, and for the same intents and purposes, and with, under, and subject to the same powers, provisos, conditions, and declarations, as are contained and referred to in this my will concerning the present subsisting leases, or the premises therein comprised. Provided, and my will further is, that it shall be lawful for my said trustees, their heirs, executors, administrators, and assigns, in the mean time, until such settlement of my said estates shall be made as hereinbefore directed, to make or grant leases of all my said freehold, and also of my said copyhold and leasehold manors and premises hereinbefore devised to them upon trust as aforesaid, which may be remaining unsold, for any term not exceeding 21 years in possession, reserving the improved rents, and without taking fines, and subject to the like restrictions as are mentioned with respect to leases to be made under the power of leasing directed to be inserted in the said intended settlement, and to appoint such persons as they shall think proper to oversee, manage, and improve my said estates and premises, and to receive the rents, issues, and profits thereof, and to pay or allow to, or permit such overseer or overseers, receiver or receivers, to retain such poundage, or sum or sums of money, by way of salary or wages, as my said trus-
- Trustees to renew the leases as and when they shall think proper.
- All the renewed leases to be vested in the trustees upon the same trusts.
- Trustees to make leases in the mean time until the estates are sold, upon the same terms as above mentioned in respect to the leases to be made under the power for that purpose to be inserted in the settlement.
- To appoint persons to oversee and manage the property, and to re-

tees or the trustees or trustee for the time being shall think meet or reasonable. And I give the following legacies, 'that is to say,' to my said wife —*l.* for mourning, and her immediate occasions, and to my other executors and trustees above-named 100*l.* each, as a small acknowledgment for the trouble they will have in the execution of this my will. And I desire my executors to give mourning and one year's wages, (over and above what may be due for wages) to all such my servants as they in their discretion may think proper. And I give to my said nephew J. A. —*l.* to be paid to him at his age of 21; to D. C. —*l.*; to my nephew L. —*l.*; to my niece E. F. —*l.* at and when she shall arrive at her age of 21, or be married; to my nephew T. D. —*l.* at his age of 21, with interest in the mean time; to R. S. and J. F. —*l.* each, at their several ages of 21; and unto each of my nieces A. J. and J. S. —*l.*; unto E. and A. H. —*l.*; unto J. B., H. B. and C. B. children of my niece D. N. —*l.* each; all the said legacies to be paid to the respective legatees within 12 months after my decease, (save and except those given to my said wife, my said trustees and executors, and my servants, which are to be paid immediately after my death). And I give unto the said Sarah S. the daughter of ———, the sum of —*l.* on the day of her marriage; and I give after her decease the said sum of —*l.* unto such child or children of her the said S. S. as shall attain the age of 21 years, to be divided among them (if more than one) in equal shares, and if but one; the whole to go to such one child as shall attain the said age. The portion or portions of such of them as may attain the said age, in the life-time of the said S. S., to be a vested interest or vested interests, though not payable till after her death, and the interest of the presumptive portions of such of her children as may be under the said age at the time of her death, or so much thereof as shall be thought necessary, to be applied for or towards the maintenance and education of such infant child or children, until he, she, or they shall attain the said age; and the surplus dividends, or interest which may not be applied for that purpose to accumulate and go along with the original share or shares; or in case there shall be no such children who shall attain the said age, such accumulations to fall together with

No. 13.

ceive  
rents, and  
to allow  
them pro-  
per sala-  
ries.

Pecuniary  
legacies.

To his wife  
a sum for  
her imme-  
diate occa-  
sions.

To his exe-  
cutors for  
their trou-  
ble.

Advance  
of wages to  
servants.

Legacies  
settled.



**No. 13.** the principal sum into my residuary personal estate. And I give unto J. W. daughter of my said nephew ———, 200*l.* but the same not to be vested in or paid to her till she shall attain the age of 21 years, and not to bear interest in the mean time; I give unto J. R. daughter of ———, 500*l.* but the same not to be vested in or paid to her till the age of 21 years, and not to bear interest in the mean time; I give unto J. B. eldest son of the said E. ———, whom I have hitherto brought up and taken under my protection, —*l.* over and above what he may participate in the —*l.* hereinbefore given among the children of the said E. ———, but the same not to be vested in or paid to him till his age of 21 years, and not to bear interest in the mean time; and unto such child or children of my said nephew I. J., (born in his life-time or after his death) as shall attain the age of 21 years, the sum of —*l.* to be divided between or among them, if more than one, share and share alike, and if but one then the whole to such one child as shall attain such age, and not to bear interest in the mean time. And after the decease of my said niece I. M., I give unto such child or children of her, now in being or hereafter to be born, as shall live to attain the said age of 21 years, the sum of —*l.* the same to be divided between or among them (if more than one), share and share alike, and if but one then the whole to such one child as shall attain the said age, and not to bear interest in the mean time, but the portions of such of them as shall attain the age of 21 years in his life-time, shall be vested interests, though not payable until after her death, and after the decease of my said niece I. M. I give the sum of —*l.* to such child or children of her now in being, or hereafter to be born, as shall attain the age of 21 years, the same to be divided between or among them if more than one, share and share alike; and if but one, the whole to such one child as shall attain the said age, and not to bear interest in the mean time; but the portions of such of them as shall attain the said age in her life-time, shall be vested interests, though not payable till after her death. And I give after the decease of the said E., unto such child or children of him the said E., born in his life-time, or after his decease as shall attain the age of 21 years,

—I. the same to be divided among them, if more than one, in equal shares, and if but one, the whole to go to such one child as shall attain the said age, and not to bear interest; save that in case of the death of the said E., having a child or children under the age of 21 years, my will is that my said trustees or trustee for the time being shall and may pay and apply any sum not exceeding the sum of 50*l.* per annum, by equal quarterly payments, for and towards the maintenance and education of such infant child or children, until he, she, or they shall attain the age of 21 years. And I will that the portions of such children of the said E. as shall attain the said age of 21 years in his life-time, shall be vested interests, though not payable till after his death. And as a further provision for the said E. B., whom I have hitherto brought up and taken under my protection, I empower my said trustees or trustee for the time being, to apply such sum and sums of money (not exceeding —*l.* in the whole) for placing out the said E. B., apprentice to some profession or trade as they the said trustees or trustee shall think proper, recommending to his choice the profession of ———, when and so soon as he shall arrive at a proper age for that purpose. And I declare that such sum or sums as may be thought fit to be applied for that purpose, shall be considered as falling under the class of my pecuniary legacies. And I give and bequeath unto my said trustees and executors, the exchequer annuity of —*l.* which I purchased for the life of my said niece I. M. my nominee, in trust, to pay and apply the same as she my said niece, notwithstanding her present or future coverture, shall by any note or writing under her hand, direct or appoint, and in default, at any time, of such direction or appointment, then shall and do pay the same into her proper hands, for her own sole and separate use and benefit, to the intent that the same annuity or any part thereof may not be subject to the debts, power, or control of her present or any future husband; and I declare that the receipt or receipts of her, or of the person or persons to whom she may direct the same to be paid, shall from time to time, notwithstanding her coverture, be a sufficient discharge or discharges for the said annuity, or so much thereof as in such receipt or receipts shall be acknowledged or

**No. 13.** expressed to be received. And I release to ———, the debt secured to me by his bond, and a judgment thereon, and desire my executors to deliver to him the said bond to be cancelled, and to acknowledge satisfaction on the judgment at his costs. And I give all the goods and fixtures belonging to me, and now at or upon my farms and lands in ———, in the occupation of ———, unto ———, to and for his own use, without any account to be rendered by him to my executors, in respect thereof, which bequest, together with the legacy of ———*l.* hereinbefore given to him, I consider as sufficient, having heretofore amply advanced him. And I give and bequeath all the rest and residue of my personal estate and effects, of what nature or kind soever the same may be, unto my said trustees, their heirs, executors, administrators, and assigns, upon trust, that my said trustees, or the trustees, or trustee, for the time being, do and shall invest the same in the purchase of manors, messuages, lands, tenements or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple, in possession, to be situate or arising somewhere in that part of Great Britain, called England; and do and shall convey, settle, and assure such manors, messuages, lands, tenements, or hereditaments, as may be so purchased, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisos, limitations and declarations, as are hereinbefore directed to be limited, expressed or declared in and by such settlement as aforesaid, of and concerning such of the freehold manors, and hereditaments devised by this my will, as are intended to be comprised in the same settlement, or such and so many of them as shall be then subsisting, undetermined, or capable of taking effect. Provided, and my will is, that it shall be lawful for my said trustees, or the trustees, or trustee, for the time being, to place out my residuary personal estate, in the mean time, and from time to time until a convenient purchase, or purchases of lands, or hereditaments can be found, in the public funds, or upon government or real securities at interest, in their, his, or her names or name, and when and as often as it may be thought prudent or proper to call in the principal money so placed out,

Residue of the personal estate to be laid out in the purchase of other estates to be settled as before directed concerning the before devised estates.


The same to be placed out in the funds until convenient purchases can be made, with power to vary and transpose the securities.

or to sell and transfer such funds or securities, and to reinvest the principal money so called in, or arising by such sale or transfer, in or upon any new, or other funds or securities of the like kind, and so from time to time to vary, alter, or transpose all such funds or securities for others of the same nature, so often as it may be thought meet. And my will is, that the dividends and interest arising from all such principal money, funds, and securities, shall, from time to time, go and be paid to such person or persons, and be applied for such intents and purposes, as the rents and profits of the lands, or hereditaments, to be purchased therewith, and settled as aforesaid, would go or be payable, or applicable unto, in case such purchase and settlement were actually made. Provided, and my will further is, that when, and so often as any of them, the said, &c. my said trustees hereby appointed, or any succeeding trustee or trustees, (whether introduced into the trusts of this my will, or any of them, by nomination or appointment under this present power, or by representation of any deceased trustee, or trustees,) shall die, or refuse, or neglect to act, or be desirous to be discharged from, or become incapable of acting in the execution of the said trusts, or any of them, it shall and may be lawful for the surviving, or other trustees, or trustee, for the time being, whether introduced into such trusts by nomination or appointment, or by representation as aforesaid, by any deed or writing, deeds or writings, under his, her, or their hand and seal, or hands and seals, attested by two or more credible witnesses, to nominate and appoint any other person or persons to be a trustee or trustees for the purposes herein mentioned, or any of them, in the stead of such trustee or trustees, so dying, or refusing, or neglecting to act, or being desirous to be discharged as aforesaid. And the said trust estates, whether real or personal, shall upon, or so soon as conveniently may be after every such nomination or appointment, be conveyed, assigned, and transferred, so as that the same may be vested in such new trustee, or trustees, (if any) their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively. And if there shall be no continuing-trustee, then wholly in

No. 13.

The interest and dividends to go as the rents of the purchased estates would go, if purchased.

Power for change, and substitution of the trustees under the will.

**No. 13.**  such new trustee, or trustees, as the case may happen, and his or their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, and declarations expressed or declared concerning the same respectively by this my will, or such and so many of them as shall be then subsisting, or capable of taking effect; and every such new trustee, his heirs, executors, administrators, and assigns, shall have, and be invested with every power and authority hereby delegated to the trustees herein named, either alone, or in conjunction with such former trustees, or trustee, as the case shall be. Provided also, that my said trustees respectively, for the time being, shall be charged, and chargeable only with such monies as they respectively shall have actually received, and that one of them shall not be answerable or accountable for the other, or for the acts, receipts, neglects or defaults of the other of them, but each only for his, her, or their own acts, receipts, neglects, or defaults; neither shall they, my said trustees, for the time being, be answerable or accountable for any misfortune, loss, or damage, that may happen, of or to the said trust estates, monies, and premises, or any part thereof, except the same shall happen by or through his, her, or their wilful default respectively. And also, that my said trustees for the time being, and each of them, their, and each of their heirs, executors, administrators, and assigns, shall and may, by and out of the monies that shall come to their respective hands by virtue of the trusts aforesaid, retain to, and reimburse herself, himself, and themselves respectively, and allow to his, her, or their co-trustee or co-trustees, all such costs, charges and expences, as they, either, or any of them shall or may respectively sustain, expend, disburse, or be put unto, in or about the execution of the trusts hereby in them reposed, or in any wise relating thereto. And I appoint \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, executrix and executors of this my will. And I also appoint them, and the survivor and survivors of them, guardian and guardians of such child or children as I may have, whether born in my life, or after my decease, during

their respective minorities. And I revoke all former and No. 13.  
other wills by me at any time heretofore made, and declare  
this only to be my last will and testament. In witness, &c.

No. 14.

*A Merchant's Will, providing for the continuance of his trade, under the management of his executors, for the benefit of his family, and for the future introduction of his sons into the business.*

THIS is the last will and testament of me, ——— of ———. I direct that my executors, hereinafter named, do and shall, within one month after my interment, cause a full, true, and accurate inventory schedule and account to be made and taken of all and singular my estate and effects of every nature or kind whatsoever, whether real or personal, and that five fair copies thereof shall be transcribed and signed by all my said executors, and that one of the said copies so signed as aforesaid, shall be delivered to each of my said executors, for his own use. And I will and direct that all such debts and sums of money as I shall justly owe at the time of my decease, together with the expences of my funeral, and the probate of this my will, and the execution thereof, be fully paid and satisfied by my said executors, out of my personal estate. I give and bequeath to my dear wife, S. T., the sum of 100%. to be paid to her immediately after my decease; and to each of my children, who shall be then living, the sum of 20%, to be applied by their mother, for their use in mourning and necessities, immediately after my decease. I give and bequeath unto my said wife, S. T.,

Executors within a month after testator's interment to make an inventory of all his estate and effects.

Debts and funeral and testamentary charges to be paid out of the personal estate.

## No. 14.

Annuity to the wife, durante viduitate, over and above the settled provision.

In case of her second marriage, the annuity to be reduced and paid to her separate use.

over and above the estates which are already settled upon her, (situate, &c.) one annuity, or yearly sum of 400*l.* for and during the term of her natural life, in case she shall so long continue my widow; and I do hereby direct that the same shall be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from or by the capital to be employed in my trade or business of ———, which is to be carried on by my said executors, according to the directions hereinafter for that purpose given and contained: and that the said annuity, or yearly sum of 400*l.* shall be paid to her, my said wife, by four equal quarterly payments, on Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year, the first payment thereof to begin and be made on such of the said days as shall next happen after my decease. But in case my said wife shall marry again, at any time after my decease, then, and in such case, I revoke the said bequest of the said annuity of 400*l.* hereinbefore given to her, and direct that the same shall, from thenceforth, cease and determine; and instead thereof, I give and bequeath unto ——— and ———, one annuity or yearly sum of 300*l.*, for and during the remainder of the natural life of my said wife, subject nevertheless to the proviso hereinafter contained, for determining the same, to be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from the capital employed in my said trade or business, and to be payable at or upon the like four equal quarterly days of payment as aforesaid, that is to say, Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year: and the first payment of the said annuity of 300*l.* to begin and be made on such of the said days as shall first and next happen after such second marriage of my said wife, upon trust, nevertheless, that they, the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall pay the said last mentioned annuity of 300*l.* from time to time, as and when the same shall become due and payable, and be received by them as aforesaid, unto my said wife, S. T., in the manner hereinafter expressed. And I hereby expressly will, direct and declare, that the said annuity, or yearly sum of 300*l.* or any part thereof, shall not be subject,

or in any manner liable to the debts, control, engagements, or intermeddling of any husband, with whom my said wife shall hereafter happen to intermarry, but that the same shall, from time to time, be paid into her hands, to and for her own sole separate and peculiar use and benefit, and not into the hands of any other person or persons whomsoever. And that the receipt and receipts of my said wife, under her hand alone, notwithstanding her coverture, shall, from time to time, be a good and sufficient discharge, and good and sufficient discharges, to my said trustees, for so much of the said last mentioned annuity, as in such receipt or receipts shall be acknowledged or expressed to have been received. (Proviso for restraining her from assigning the annuity, see page 371). And my will is, that it shall and may be lawful to and for my said wife, in case she shall continue my widow until the time of her decease, (but not otherwise) in and by her last will and testament in writing, to be by her signed and published in the presence of, and attested by two or more credible witnesses, to give, bequeath and dispose of the sum of 5000*l.* to be charged and chargeable upon, and raised and paid out of the residue of my personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form as she shall think fit. But in case my said wife shall marry again at any time after my decease, and she shall not, at any time during her life, have forfeited the said annuity of 300*l.* under the proviso hereinbefore for that purpose contained, then, and in such case, but not otherwise, it shall and may be lawful to and for my said wife, by her last will and testament, to be executed and attested in such manner as aforesaid, to give, bequeath, and dispose of the sum of 2000*l.* only, to be in like manner charged, and chargeable upon, and raised and paid out of the residue of my said personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form as she shall think fit; and I do hereby charge, and make chargeable the residue of my personal estate and effects, with the payment of the said sum of 5000*l.* to the legatee or legatees thereof, to be named in the last will and testament of my said wife, in case she shall continue my widow until the time of her decease; or in case

N<sup>o</sup>. 14.

Power to the wife to dispose by will of 5000*l.* to be paid out of the residue of the personal estate; to be reduced to 2000*l.* upon her marrying again.



No. 14.

Power to the wife to reside in the dwelling house.

Annual sums to be applied out of the interest of the capital of the business, for the maintenance of testator's daughters, varying with their ages.

To invest 5000*l.* as each daughter comes of age, and to pay the interest to her for life, to her separate use.

of her marrying again, then with the payment of the said sum of 2000*l.* to the legatee, or legatees thereof accordingly. And my will is, that my said wife shall and may reside in the house wherein I now dwell, situate at \_\_\_\_\_ aforesaid, in case she shall think proper so to do, and shall and may have and enjoy the use of all my furniture, plate, linen, china, and glass, which shall be therein at the time of my decease, for and during her life, if she shall so long continue my widow, and unmarried, but not otherwise. And in case she shall think proper to quit the said house, at any time after my decease, then I give and bequeath unto her, my said wife, the sum of 500*l.*, in order to settle her in, and furnish for her any other habitation she may choose to reside in. And it is my will and mind, and I do hereby direct that the sum of \_\_\_\_\_ *l.* per annum, shall be allowed and paid out of the interest to arise, and accrue, as hereinafter is mentioned, from or by the capital to be employed in my said trade or business of \_\_\_\_\_, to be carried on by my said executors, as hereinafter mentioned, for the maintenance and education of each of my daughters, E., S., and M.; and also the like sum of \_\_\_\_\_ *l.* per annum, for the maintenance and education of each and every other daughter I may hereafter have, until my said daughters, E., S., and M., and my said other daughters shall respectively attain the said age of 12 years. And that from and after their respectively attaining the age of 12 years, the sum of 100*l.* per annum, shall be allowed and paid out of the said interest to arise or accrue as aforesaid, for the maintenance and education of each and every of my said daughters, until they respectively shall attain the age of 21 years, in case they shall so long continue sole and unmarried, but not otherwise. And my will is, and I do hereby direct that the said (trustees) or the survivors and survivor of them, or the executors or administrators of such survivor, do and shall as and when each of them my said daughters E., S., and M., and as and when each and every such other daughter as I may hereafter have, shall respectively attain the age of 21 years, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, by and out of my personal estate, lay out and invest the sum of

5000*l.* in the purchase of an equivalent share or shares of the parliamentary stocks or funds of Great Britain, in their, his or her own names or name, and that they the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor do and shall stand and be possessed of and interested in the stocks, funds, or securities, so to be purchased as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter expressed and declared of and concerning the same, (that is to say) upon trust to pay to, or otherwise sufficiently authorize and empower every such daughter so attaining the said age of 21 years, to have, receive, and take the interest, dividends, and annual produce of the stocks, funds, or securities so to be purchased with one of the said sums of 5000*l.* during her life, for her own sole, separate and peculiar use and benefit, and so as the same or any part thereof shall not be subject or in any manner liable to the debts, control, engagements, or intermeddling of any husband whom such daughter may happen to marry. And my will is, and I do hereby expressly direct and declare that the receipt and receipts of every such daughter under her hand shall, notwithstanding her coverture, be a good and sufficient discharge to my said trustees or trustee for the time being, for so much of the said dividends, interest, or annual produce, as in such receipt or receipts shall be acknowledged or expressed to have been received. Provided always, and I do hereby declare my will and mind to be, that it shall not be lawful for my said daughters respectively to charge, sell, assign, or otherwise dispose, by way of anticipation, of the interest, dividends, and annual produce so to them respectively payable as aforesaid, and that notwithstanding such charge, sale, assignment, or other disposition, it may and shall be lawful to and for my said trustees, or the trustees or trustee for the time being, and they, he and she is and are hereby required, to pay the said interest, dividends, and annual produce, into the proper hands of my said daughters respectively, for their respective, separate, and peculiar use and benefit upon their own respective receipts. And my will is, and I do hereby direct, that from and after the decease of every such daughter of my body, they, my said trustees, or the survivors or survivor of them,

No. 14.

Proviso  
against  
assigning  
or anticipat-  
ing.

To and  
among the  
children  
of daugh-  
ters, and

## No. 14.

the issue of such children born in the life-time of the daughter, as the daughter shall appoint.

Education and maintenance out of the interest of the respective portions. The residue to accumulate.

or the executors or administrators of such survivor, do and shall stand and be possessed of, and interested in the said stocks, funds, or securities so to be purchased with the said sum of 5000*l.* the interest, dividends, and annual produce whereof are hereinbefore directed to be paid for life to such daughter so dying as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same, that is to say, in trust for all and every or such one or more exclusively of the children of such my daughter, or in trust for all and every or such one or more exclusively of the issue, born in the life-time of such my daughter, of any such child or children, or both, in such manner, with such provisions for their respective maintenance or education, and if more than one such child or issue, in such shares and proportions as such my daughter respectively by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or by her last will and testament to be by her signed and published as aforesaid, shall from time to time direct or appoint. And in default of appointment of the same, under the power hereinbefore contained, or so far as such appointment shall not extend, and subject to the trusts hereinbefore declared of the same, upon trust for all and every the child and children of such my daughter, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with such consent as aforesaid, equally to be divided between or amongst them, if more than one, share and share alike, and if but one such child then for such one child. And my further will is, and I do hereby direct, that in default of appointment respectively as aforesaid, after every such my respective daughter's decease, the dividends and interest, and annual produce of the stocks, funds, or securities on which the said 5000*l.* shall have been invested, to the dividends, interest, and annual produce of which such daughter shall have been entitled, or so much as shall be thought necessary by my said trustees or the trustees or trustee for the time being, of the said dividends, interest, and annual produce, shall be applied in, for, and towards the maintenance and education of such her child or children during his, her, or their respective mino-

rities : and the residue thereof shall be invested in or upon such securities as aforesaid, and accumulated in the way of compound interest ; and that such accumulations shall be in trust for the persons who, under the trusts hereinbefore or hereinafter declared, shall become absolutely entitled to the funds whence such accumulations shall have proceeded. And in case any such my daughter shall have no child, who being a son shall attain the age of 21 years, or daughter who shall attain that age, or marry with such consent as aforesaid, then and in such case, and in default of appointment respectively as aforesaid, in trust, that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall stand and be possessed of and interested in the said stocks, funds, and securities, the interest, dividends, and annual produce whereof is hereinbefore directed to be paid to such my daughter for her life as aforesaid, in trust, for such person or persons, in such shares and proportions, and in such manner and form, as such daughter shall by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or in and by her last will and testament in writing to be by her executed and attested in such manner as aforesaid, direct, limit, or appoint ; and for want of such direction, limitation, or appointment, and as to so much or such part thereof whereof no such direction, limitation, or appointment shall be made, upon trust, for my said wife, if she shall be then living and shall have continued my widow, and all and every my children now born or hereafter to be born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, to be divided between or amongst my said widow and children, share and share alike ; but in case my said wife shall be then dead, or shall not till then have continued my widow, upon trust, for all and every my children now born or hereafter to be born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters, shall attain that age, or marry with such consent as aforesaid, to be divided between or among them, if more than one, share and share

No. 14.

And if no child of any of his daughters shall live to attain 21, then to such persons as the daughter shall appoint.

And in default of appointment to go to and among his widow and children, in case his widow shall not have married again, and if she shall have married again, then among the children only.

**No. 14.** alike, and if but one such child, then the whole to be in trust for that one child, and if I shall have no child, then the whole to be in trust for my wife, if she shall be then living and shall have continued my widow as aforesaid. And my will is, and I do hereby direct, that the sum of 70*l.* per annum shall be allowed and paid out of the interest to arise or accrue as hereinafter is mentioned, from or by the capital employed in my said trade or business to be carried on by my said executors as hereinafter is mentioned, for the maintenance and education of each of my sons now born, or hereafter to be born, until they shall respectively attain the age of 12 years, and from and after their respectively attaining that age, that the sum of 100*l.* per annum shall be allowed and paid, out of the interest to arise or accrue as aforesaid, for the maintenance and education of each of my said sons now born or hereafter to be born, until they shall respectively attain the age of 21 years. And whereas I think it will be advantageous to my sons that the trade or business, which I now carry on at — aforesaid, shall be continued after my decease, and preserved for them or such of them as may choose to carry on the same, when they shall attain a proper age; and I am therefore desirous of giving my said wife and my said trustees hereinafter named, full power to continue and carry on the same in such manner as is hereinafter-mentioned: now I do for that purpose give and bequeath all my capital and stock in trade, and all my cash, debts, and effects which shall be employed in or belonging to the said trade or business at the time of my decease, unto my said wife and the said trustees, their executors, administrators, and assigns, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed and declared concerning the same, (that is to say) upon trust, that they my said wife, and the said (trustees), and the survivors and survivor of them, and the executors or administrators of such survivor, may and shall carry on the said trade or business of a —, for the term or time, and in manner hereinafter-mentioned, (that is to say) if all my sons, W., F., T., and G., shall attain the age of 21 years, then until the youngest of my said sons shall attain the age of 21 years; but if all of them shall not live to attain the age of 21 years,

An annual sum to be applied out of the interest of the capital to be employed in the business, to and for the maintenance and education of testator's sons; to vary in amount with their ages.

Testator's trade to be carried on by his executors.

To be carried on by the executors till the youngest

then until the last of them attaining the age of 21 years, shall actually attain that age, or for such further or longer period as may be necessary for the purpose of performing the trusts hereby in them reposed of or concerning the said trade or business. And I give and bequeath unto such of them the said (trustees) as shall prove this my will, and act in the execution of the trusts thereof, but not otherwise, for his trouble therein, the annual sum of ———/l. to commence and be computed from the time of my decease, and continue until my second son for the time being, shall attain the age of 22 years, the same to be paid annually, and after the same rate for any less time than a year that shall happen of the period between the time of my decease, and such my second son's attaining the age of 22 years as aforesaid. And my will is, and I do hereby direct, that they the said (trustees,) and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, immediately after my decease, cause a full, true, and just account in writing, to be made and taken of all the capital, stock, and cash employed in the trade aforesaid, and all the debts and things which shall be then belonging, due, and owing to the said trade, and of all such debts as shall be due or owing from or by the said trade to any person or persons; and do and shall cause a just valuation and appraisement to be made of all the particulars in the said account, in order that the net amount of the capital then employed in the said trade may clearly appear; and that my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, on ——— next after my decease, or within one calendar month then next following, and so yearly and every year whilst the said trade shall be carried on by them, in pursuance of the powers herein for that purpose contained, on the same day, or within one calendar month next afterwards, cause to be made up and stated a full and accurate account, statement, and adjustment of the accounts of the said trade, and shall and do cause to be made and taken, a like account, in writing, of all the stock, monies, debts, and other things which shall be then belonging, due, or owing to the said trade, and of all such debts, as shall be due or owing from or by

No. 14.

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The execu-  
tors to have  
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sum for  
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Executors  
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count of all  
the stock  
and cash  
employed in  
the trade,  
and of the  
debts due  
to or from  
the same,  
and to have  
all the prop-  
erty in the  
trade val-  
ued, that  
the amount  
of the net  
capital may  
appear.

And to  
make out  
a yearly  
account.

**No. 14.** the said trade, to any person or persons whomsoever, and do and shall cause a just valuation and appraisement to be made of all the particulars included in such account; and that the profits and gains which shall arise, or be made from or by the said trade, shall in the first place be liable to answer interest after the rate of 5*l.* per cent. per annum, upon the net amount of the capital in cash and effects, which shall be from time to time employed in the said trade, including the debts owing to the trade, of which interest a distinct account shall be kept; and out of such interest my said wife shall have, receive, and be paid the annuity hereinbefore given to her, or in trust for her as aforesaid, and the said several sums hereinbefore directed to be allowed and paid, for the maintenance and education of my said sons and daughters respectively, shall be allowed, deducted, and paid; and subject thereto respectively, the said interest shall, from time to time, be laid out in, or invested upon, the parliamentary stocks or public funds of Great Britain, or at interest upon government securities in England, to be from time to time altered and varied at the discretion of my said trustees, or the trustees or trustee for the time being, so that the same and the resulting income and produce thereof may be accumulated in the way of compound interest, until the same shall be divided amongst my sons, as well those already born as those hereafter to be born, in the manner next hereinafter mentioned, (that is to say) the same shall be divided into as many shares as I shall have sons already born or hereafter to be born, and when each of my said sons shall attain the age of 21 years, he shall have and be entitled to one of such shares, and the same shall be paid to him as follows, (that is to say) one moiety or half part of such share immediately on his attaining the age of 21 years, and the other moiety or half part of such share, together with the intermediate accumulations of such moiety, on his attaining the age of 25 years; and each of such my said sons shall, from and after his attaining his age of 21 years, also have and receive a proportionable part or share of the gains to arise or accrue on the said capital, after payment of the said annuity to his mother, and the several sums hereinbefore directed to be allowed and paid thereout as aforesaid. And

The profits of the trade in the first place to answer the interest of 5*l.* per cent. per ann. upon the net amount of the capital employed.

The annuity to the wife, and the several sums before directed to be allowed and paid, to come out of this interest.

And subject to such trusts, to invest the residue of such interest in the funds or government securities, to accumulate in the way of compound interest, until divided amongst the sons.

This division to be in equal shares, one moiety to be paid as they respectively arrive at the age of 21, and the other moiety, with the intermediate accumulations, as they arrive at the age of 25.

I do hereby declare my will and mind to be, that the overplus of the said profits and gains, after answering interest upon the said capital as aforesaid, shall from time to time be added to the said capital, and shall be therewith employed in carrying on the said trade or business as hereinbefore directed. Provided always, that in case any of my said sons shall depart this life under the age of 21 years; then and in such case, and so often as the same shall happen, the part or share of such son so dying, of and in the money so directed to be raised for interest, and so to be invested and accumulated as aforesaid, and also the future interest to accrue for the same, shall be paid to and amongst the survivors or others of them, if more than one, share and share alike, and if more than one of my said sons shall depart this life under the age of 21 years, then and in such case, and so often as the same shall happen, the surviving or accruing share or shares to which such son or sons would, on attaining the age of 21 years, have become entitled under the clause last hereinbefore mentioned, shall again survive and accrue to the survivors or survivor, or others or other of them my said sons, in equal shares and proportions if more than one, and in case all of them save one shall happen to die under the age of 21 years, then as well the whole of the interest so to be invested and accumulated as the whole of such profits and gains to belong to such one or only son, and to be an interest vested in him on his attaining the age of 21 years, and to be paid to him at the respective times and in manner aforesaid. And my will is, that when my said son W. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth of the profits and gains which, after answering such interest as aforesaid while the same shall continue payable, may or shall arise or be made in the said trade after his admission as such partner therein; and my will also is, that when my son F. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth part of the profits and gain which, after answering the said interest,

No. 14.

The overplus of the profits, after answering such interest upon the capital, to be added to the capital employed in the business. Shares of the sons to survive.

Each son attaining 21 to be admitted a partner, and to be intitled to a fourth.



**No. 14.** shall arise or be made in the said trade after his admission as a partner therein ; and my further will is, and I do hereby declare, that when my son T. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth part or share of the profits and gains, which, after answering the said interest, shall arise or be made in the said trade after his admission as a partner therein ; and further my will is, that when my son G. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case be entitled, during the partnership, to one-fourth part of the profits and gains which shall, after answering the said interest, arise after his admission as a partner therein. And my will is, and I do hereby direct, that all my said sons shall, within the space of one year next after they shall respectively attain the age of 21 years, determine and elect whether they will become partners in the said trade or not, and in case they determine and elect to become partners therein, they shall within that time respectively notify such their election and determination, by writing, under their respective hands, to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or otherwise they shall be considered as having refused to become partners therein. Provided always, and my will is, that in case my trustees, or trustee for the time being, or the major part of them, shall, from the conduct of any or either of my sons who shall become and be a partner or partners as aforesaid, while any of the trusts of this my will, respecting the said trade, shall remain unperformed, be of opinion that it will be injurious to the trade then carried on, and to the rest of the partners therein, that such son or sons should any longer continue a partner or partners in the said trade, that then and in such case it shall be lawful to and for my said trustees, or the trustees or trustee for the time being, or the major part of them, and he and they shall have full power and authority immediately to dissolve the partnership, so far as respects such son or sons, and such son or sons shall thenceforth be no longer a partner or partners in the said

The sons to make their election as they come of age, to enter into the business or not.

Proviso empowering the trustees to remove from the business any son, whose conduct proves him to be unqualified.

trade, but from and after such dissolution of the said partnership, or dismissal therefrom, shall have, and be entitled to such legacy and legacies, and provision, as is hereinafter made for such of my said sons as shall neglect or refuse to become a partner or partners in the said trade or business, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. And my further will is, and I do hereby direct, that in case any of my said sons W., F., T., and G. shall refuse to become partners or a partner in the said trade, within the time aforesaid, then every of such sons so refusing to become a partner in the said trade shall, upon his attaining the age of 22 years, (but not unless he attains that age) have and receive, from and out of the capital then employed therein, the sum of 4000*l.* to and for his and their own use and benefit; and every of such sons shall, nevertheless, be entitled to, and shall have and receive, his original share of the interest which shall have arisen or accrued from or by the said capital employed in the said trade, up to the time of his attaining the age of 21 years, the same to be paid and payable at the time and in the manner hereinbefore mentioned, but shall not be entitled to any further part or share thereof, by way of survivorship or accruer, on the death of any other or others of my said sons. And I also declare my will and mind to be, that in case any of my said sons W., F., T., and G. shall depart this life under the age of 21 years, or shall refuse to become a partner in the said trade within the time aforesaid, or withdraw himself therefrom after his admission as a partner therein, then and in such case the survivors and survivor of them my said sons W., F., T., and G., who shall elect to become such partner or partners in the said trade, in the manner and upon the terms aforesaid, shall have and be entitled in equal shares and proportions, to the whole of the share or shares to which such son or sons, so dying under the age of 21 years, or declining to become a partner or partners in the said trade, or withdrawing himself therefrom, would either originally or by survivorship or accruer have been entitled, of the profits and gains which, after deducting such interests as aforesaid, shall arise or be made in the said trade or business, after their respective admission as partners therein. And in case

No. 14.

And such son so excluded or refusing, shall have the legacy and provision aftermentioned.

Such son to have a legacy of 4000*l.* and his original but not accruing share in the interest of 5 per cent. upon the capital aforesaid.

All the profits and gains of the business, after answering the objects aforesaid, to belong to the survivors of those dying under 21 continuing in the business, and to such as elect to be in and continue in the business, exclusively of those who refuse or withdraw.

**No. 14.**

If only one son shall elect to be in the business, he is to pay one sixteenth of the profits to the others refusing until their attaining — years, or dying, provided they do not carry on the same trade within the weekly bills of mortality.

Future stile or firm of the partnership.

If all refuse or withdraw, they are to have each one sixteenth till the age aforesaid, or death.

all my said sons but one shall happen to depart this life under the age of 21 years, or shall refuse to become partners in the said trade, then and in such case, such one son who shall elect to come into the said trade in order to carry on the same in partnership as aforesaid, shall have and be entitled to the whole of the profits and gains which shall arise or be made in the said trade, after his admission to the same, (after answering and paying thereout interest upon the net amount of the capital employed in the said trade, and also paying unto such of his brothers as shall refuse or decline to carry on the said trade in partnership, or shall withdraw himself from the said trade after his admission as a partner therein, one-sixteenth part of such profits and gains, until such brother shall attain the age of — years, or depart this life, provided such brother shall not carry on the same trade within the weekly bills of mortality as hereinafter is mentioned;) and such one son who shall elect to come into the said trade in order to carry on the same in partnership, and shall continue therein, shall and may thenceforth, and subject as aforesaid, carry on the said trade to and for his own use and benefit. And my will is, and I do hereby direct, that the firm or stile by which the said trade shall be carried on, until one or more of my said sons shall be admitted therein, shall be “———,” and after the admission of one or more of my said sons therein the same shall be “——— and Son,” or “——— and Sons,” as the case may be. And my will is, and I do hereby direct, that in case all or any of my said sons shall refuse or decline (within the respective times before limited) to carry on the said trade or business in partnership, upon the terms and in the manner hereinbefore mentioned, then I do hereby direct, that every such son, so refusing or declining to carry on the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits or gains thereof, until they shall respectively attain the age of — years, or depart this life, which shall first happen; and in case any of my said sons, who shall become a partner or partners in the said trade or business, shall at any time after his or their admission into the same, and before his or their attaining the age of — years, be desirous of withdrawing himself or themselves

therefrom, then and in such case such son or sons, so withdrawing himself or themselves from the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits and gains thereof, until he or they shall attain the age of — years, or depart this life, which shall first happen. Provided always, that no such son or sons, so refusing, declining, or withdrawing himself or themselves, shall afterwards carry on the same trade within the weekly bills of mortality. But in case such son or sons, so refusing, declining, or withdrawing as aforesaid, shall carry on or be concerned in the same trade within the bills of mortality, then and from thenceforth the said one-sixteenth part or share, so directed to be paid to him, shall cease and determine, and he or they shall not, at any time thereafter, have or be entitled to any share of the profits and gains of the said trade or business to be carried on by the other son or sons, in pursuance of this my will. And my will is, and I do hereby direct, that when all my said sons, W., F., T., and G., shall have attained the age of 28 years, in case they shall all of them have elected to become partners in the said trade, and none of them shall have withdrawn himself from the same, or in case any of my said sons shall have declined or refused to become partners or a partner in the said trade, or withdrawn themselves or himself therefrom, and have departed this life under the age of 28 years, and I shall have any other son or sons hereafter born who shall live to attain the age of 21 years, (in which case such after-born son or sons shall have the election of coming into the said trade, and being admitted a partner or partners therein, if he or they shall think proper, in the place of his brother or brothers who shall so decline or refuse to become a partner or partners therein, or withdraw himself therefrom, or die under the age of 28 years,) then when such after-born son or sons, as shall so elect to come into and be a partner or partners in the said trade, shall have attained the age of 28 years, or have departed this life under that age, and being in partnership as aforesaid at the time of such death, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall make up, state, and settle a full and

No. 14.


The sixteenth share to cease upon any of them carrying on the same trade within the bills of mortality.

When all the children, being in the partnership, shall have reached 28, or be dead under that age, whilst in partnership, the trustees are to make up a general account of all the effects, and invest 20,000*l.* in the funds, and then distribute the residue into double the number of shares that there are children living to 28 years in the partnership, or dying in the partnership and leaving widows and children,

No. 14.

and to give one share to the family of each son so dying under 28, in the business, and the remaining shares equally among those who have lived to attain 28, in the partnership business.

general account, in writing, of all the stock, monies, debts, and effects, which shall be in or belonging, or due or owing to the said trade or business, and shall do cause a just valuation and appraisement to be made of all the particulars thereof, and do and shall in the first place (after raising and paying thereout the sum or sums of money hereinbefore mentioned, to each of my said sons and daughters, or such of them as shall have lived to become entitled thereto) raise thereout the sum of 20,000*l.*, and lay out and invest the same in the purchase of a competent share or competent shares of the parliamentary stocks or funds of Great Britain, in their, or his, or her own names or name, and do and shall stand and be possessed of, and interested in, the said stocks, funds, and securities to be purchased with the said sum of 20,000*l.*, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same ; and after the said several sums so to be raised shall have been raised as aforesaid, and all the legacies hereby given and bequeathed shall be answered and paid, and subject thereto, then upon trust, that they my said trustees, or the survivors or survivor of them, and the executors or administrators of such survivor, do and shall part and divide all the residue and remainder of the said capital, stock, debts, and effects which shall be in or belonging, or due or owing, to the said trade or business, into double the number of shares, as there shall be sons of my body now born, or hereafter to be born, who shall attain the age of 28 years and be then living, or who, while in partnership as aforesaid, shall have attained the age of 28 years, or die under that age, leaving a widow and a child, or children living at his decease, or born in due time after, or a widow only, living at his decease, or a child or children living at his decease, and no widow ; and if all my said sons, so electing to be and remaining partners, shall attain the age of 28 years, the whole of the said capital, stocks, debts and effects shall be, in trust, for such my said sons, in equal shares and proportions ; and if I shall have but one son electing to be and continuing a partner, who shall attain the age of 28 years, and no son who, being and continuing a partner as aforesaid, shall depart this life under that

age, leaving a widow and a child or children living at his No. 14.  
decease, or born in due time after, or leaving a widow only,   
or a child or children then living, but no widow, then the  
whole of the said capital, stock, debts, and effects, to be in  
trust for that one son; and if I shall have one or more son  
or sons, who, being a partner or partners, shall attain the  
age of 28 years, and one or more son or sons, who, being  
and continuing a partner as aforesaid, shall die, leaving a  
widow and a child or children living at his or their decease,  
or respective deceases, or born in due time after, or leaving  
a widow only, or a child or children living at his or their  
decease, or respective deceases, but no widow, then if only  
one of my sons, being and continuing a partner as aforesaid,  
shall have left a widow and children, or a child living at his  
decease, or born in due time after, or have left a widow  
only, or a child or children only living at his decease, and  
no widow, one of the said shares shall be laid out and in-  
vested in the public funds, upon the trusts hereinafter ex-  
pressed and declared, for the use and benefit of the widow,  
and child or children of such one son, dying while such  
partner as aforesaid, and leaving such widow, child, or  
children as aforesaid: and if more than one of my said sons,  
being and continuing a partner as aforesaid, at the time of  
his death, shall have left a widow and a child or children  
living at their respective deceases, or born in due time  
after, or a widow only, or a child or children living at his  
or their respective deceases and no widow, then as many of  
the said shares shall be so laid out and invested, upon the  
trusts hereinafter expressed, as I shall have sons, being or  
continuing a partner as aforesaid, at the time of their deaths,  
who shall have respectively left a widow, and a child or  
children living at their respective deceases, or born in due  
time after, or have left a widow only, or a child or children  
living at their respective deceases and no widow, and the  
remainder of the said shares shall be divided between or  
amongst such of my said sons then living as shall have  
elected to become partners, and shall have continued part-  
ners in the said trade to their respective age of 28 years,  
share and share alike; and if but one shall be then living,  
who shall have elected to enter into and carry on, and shall

**No. 14.** have continued in the said trade, and shall have attained the age of 28 years, then such one son shall have and be entitled to the remaining shares thereof, the part or share, or parts or shares of such widow and child or children, respectively to be ascertained, according to the then last preceding annual settlement, and to be paid to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon trust, that they the said trustees, or the trustees or trustee for the time being, do and shall place out, and invest the same in the purchase of a competent share or competent shares of the parliamentary stocks of public funds of Great Britain, in their, or his, or her own names or name, and do and shall stand and be possessed of the said stocks, funds, and securities so to be purchased as aforesaid, upon such and the same trusts, for the benefit of such widow and children, and with such limitations over, for the benefit of my other sons and their widows and children, and subject to such powers and provisos as are hereinafter mentioned, expressed, and declared of and concerning the stocks or funds to be purchased with the said sum of 20,000*l.* hereinbefore directed to be invested as aforesaid, so far as such trusts relate to the widows and children of the sons, for whom or for whose widow and children the said sum of 20,000*l.* is intended to be invested, or as near thereto as circumstances will permit. Provided always, and in case I shall have no son, who, being a partner, shall attain the age of 28 years, and be living at the time hereinbefore expressed to entitle him to such surplus or remaining shares, and I shall have two or more sons who shall become partners as aforesaid, and while in partnership shall die and leave a widow and a child or children living at his or their decease or respective deceases, or born in due time after, or leave a widow only, or a child or children living at his or their decease or respective deceases, and no widow, then it is my will that the widow and child or children, or widow only, or child or children of such deceased sons, shall, per stirpes, and not per capita, be entitled to have, take, and divide among them such surplus shares, in such proportions as shall be equal to the number of my sons who shall become partners as aforesaid, and

and while in partnership die, and leave such widow and child, or children, or such widow only, or such child or children, and no widow as aforesaid, and so that such widow or widows, and child or children, may, in the proportions aforesaid, according to their stocks, husbands and parents, respectively, be entitled to the whole of the surplus shares between or among them, according to the trusts hereinafter declared, of their said several and respective proportions; and in case I shall have only one such son as last hereinbefore mentioned, then it is my will that such widow and child, or children, or such widow only, or child or children of such only son, shall be entitled to have and take such surplus shares, and the full and whole benefit of the same, as well as the other provisions hereby made for him, her, or them, according to the trusts hereinafter declared. And in case I shall have no son, who, being a partner as aforesaid, shall attain the age of twenty-eight years, and be living at the time hereinbefore expressed to entitle him to such surplus shares, nor any son who shall become a partner as aforesaid, and while in partnership as aforesaid, shall die, leaving such widow and child, or children only as aforesaid, then, and in that case, all the residue and remainder of the said capital, stock, debts, and effects shall be in trust for all and every the children of my said daughters, who shall attain the age of 21 years, such children of my said daughters to take per capita, and not per stirpes, in equal shares and proportions, if more than one; and if there shall be but one such child, the whole to be in trust for that one child, and if none of my daughters shall have a child that shall attain the age of 21 years, then in trust for all my nephews and nieces who shall be then living, and the survivor of them, his, or her executors, administrators, or assigns. And I do hereby direct, that my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall stand, and be possessed of, and interested in, the said stocks, funds, and securities so to be purchased with the said sum of 20,000*l.*, hereinbefore directed to be raised upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared, of and concerning the same, that is to say, upon

No. 14.

And if no sons, or their families shall become entitled to these shares, then the whole remainder of the capital stock and effects of the business to go to the children of testator's daughters, per capita, and not per stirpes.

Trustees to stand possessed of the said sum of 20,000*l.*



**No. 14.** trust for all my sons, as well those already born, as those hereafter to be born, in equal shares and proportions, during their respective natural lives, as tenants in common, and not as joint tenants; and after the decease of each such son, upon trust to pay to the widow of such deceased son out of the interests and dividends of such his share of the said last-mentioned stocks, funds, and securities, such annual sum not exceeding —*l.* per annum, as the said son shall, by writing under his hand and seal, and to be attested by two or more credible witnesses, or by his last will and testament, signed and published by him, in the presence of two or more such witnesses, have directed or appointed in that behalf; and subject to such annual payment as last aforesaid, upon trust for all and every the child and children of each such son, equally to be divided between or amongst the said children, share and share alike, and if but one, then in trust for such only child; the part or share, parts or shares of such children or child to be an interest vested, or interests vested in, and be paid to him, her, or them, at his, her, or their age, or respective ages of 21 years, and if any such children shall depart this life, under the age of 21 years, then as well the original part or share, parts or shares, of him, her, or them so dying, as the part or share, or parts or shares surviving or accruing, by virtue of this present clause, shall go and be paid to the survivors or survivor, or others or other of the said children, and their respective executors, administrators, or assigns, to be an interest vested, or interests vested in, and to be paid to the child or children respectively entitled thereto, at such time or times as is hereinbefore mentioned, with respect to his, her, or their original share or shares. And I do hereby will and direct, that after the decease of such son, the interest, dividends, and annual produce of the share, to which he shall be so entitled for his life, of the said sum of 20,000*l.*, and the stocks, funds, and securities in which the same shall be invested as aforesaid, or so much of the said interest, dividends, and annual produce as my said trustees, for the time being, shall think necessary, shall, after the decease of their respective fathers, and subject to any provisions made under the power for that purpose hereinbefore given by this my will, for the widows

In trust for the sons as tenants in common for their respective lives, and after their respective deceases in trust for their children respectively, in equal shares, per stirpes, with survivorship, respectively, subject to a provision for the widow of each such son.

Clause for maintenance and education.

No. 14.  
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of their fathers respectively, be paid and applied for or towards the maintenance and education of such child or children; in the mean time, until he, she, or they shall respectively attain the age of 21 years, and the residue invested in such stocks, funds, and securities as aforesaid, so as to accumulate in the way of compound interest, and that such residue, and the accumulations thereof, shall be in trust for the persons, who, under this my will, shall become entitled to the fund whence such accumulation shall have proceeded. But in case any of my said sons shall, at the time of his, or their respective decease, leave a widow only, and no child or children, him or them surviving, or there being such child or children, in case all of them shall happen to die under the age of 21 years, then after the decease of such son or sons, as to the part or share, parts or shares, of such son or sons, as shall so die, leaving a widow, or widows, but no child or children, who shall live to attain the age of 21 years, upon trust for his or their widow, or respective widows, during their respective natural lives, (if she or they shall so long continue sole and unmarried,) and in case any one or more of my said sons shall have no child, who shall attain the age of 21 years, as aforesaid, then after his or their decease, or respective deceases, (subject to the provisions made, or to be made as aforesaid, for his, or their widow, or respective widows as aforesaid, in the share or shares to which such son or sons shall have been so originally entitled, for his or their life or lives respectively as aforesaid,) the same, immediately after the decease of such son or sons respectively, to be subdivided into as many shares as there shall be sons of my body then living, or then dead, having left a child or children, and the said shares shall be upon such trusts for my said surviving other sons, and their children respectively, as are hereinbefore declared, in respect to their said respective original shares, and so after the decease of any other son or sons, under 21 years of age, the share or shares to which such last-mentioned son or sons shall, or if living, would, by survivorship or accruer, be so entitled for life as aforesaid, shall also be upon such trusts for the then surviving, or the other sons, and their respective children, as are hereinbefore declared, as to their said respective ori-

In case of the death of a son, leaving no children, but a widow only, in trust for her during her life, and subject to the widow's interest or provision, to go among the surviving sons and their families, with survivorship as to the accruing shares.

**Art. 11.** ginal shares, and if only one of my said sons shall have a child, who shall attain the age of 21 years, then after the decease of the other of my said sons, and such failure of issue of their bodies respectively as aforesaid, (and subject to the provisions hereinbefore and hereinafter contained for their widows respectively,) the whole of the said sum of 20,000*l.*, and the stocks, funds, and securities on which the same shall be invested, to be upon such trusts for such only son, and his child or children respectively, as hereinbefore is declared as to his original share of or in the same. And in case none of my said sons shall have a child, who shall attain the age of 21 years, then as to the whole of the said stocks, funds, or securities, hereinbefore directed to be purchased as aforesaid, (subject to the powers and provisions hereinbefore contained,) upon trust for all and every the children of my said daughters, who shall attain the age of 21 years, such children of my said daughters to take per capita, and not per stirpes, in equal shares and proportions, if more than one; and if there shall be but one such child, the whole to be in trust for that one child. And if none of my daughters shall have a child, who shall attain the age of 21 years, then upon trust to pay one moiety, or equal half part of the interest, dividends, and annual produce of the said sum of 20,000*l.*, and the stocks, funds, and securities on which the same shall be invested, unto my said dear wife, during the term of her natural life, in case she shall so long continue sole and unmarried, but without making any deduction out of her said annuity of —*l.*, in respect thereof, and subject thereto, do and shall stand and be possessed of and interested in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, in trust for all my nephews and nieces, who shall be then living, or the survivor of them, and the executors, administrators and assigns of such survivor. Provided also, and my will is, that in case I shall have any other son or sons hereafter born, either in my life-time, or in due time after my decease, then I give and bequeath unto every such after-born son, 2000*l.*, to be an interest vested in and to be paid to him on his attaining the age of 21 years, and the sum of 4000*l.*, to be an interest in, and to be paid him upon his attaining the

And in case all the sons shall die without leaving any child, who shall acquire a vested interest, then subject to the widow's interest, to go to the children of the testator's daughters, and if none of the daughters shall leave a child, who shall acquire a vested interest, then the interest of the whole to be for the wife of testator, durante viduitate, and upon her decease, to testator's nephews and nieces, their executors, administrators and assigns.

Legacies to after-born sons, who are also to have equal shares in the 20,000*l.*

age of 24 years; and my will is, that every such after-born son, and his child and children (if any) shall have and be entitled to a share of the stocks, funds, and securities, to be purchased with the said sum of 20,000*l.*, hereinbefore directed to be invested as aforesaid, equally with my said sons, W., F., T., and G., and their children, the same to be payable, and paid at such time and times, and with, under, and subject to such and the same powers, provisos, and limitations, and to be attended with the same right of survivorship, and in such and the same manner in all respects as the shares to or in trust for my said sons, W., F., T., and G., and their widows and children, of and in the same stocks, funds, and securities, as are hereinbefore directed, limited, given, and bequeathed. Provided also, and my will is, and I do hereby direct, that in case any of my said sons shall depart this life whilst in the said business, before he shall attain the age of 28 years, leaving either a widow, and one or more child or children, him surviving, then, and in such case, as often as the same shall happen, I do hereby direct that such account and valuation as aforesaid, shall be made, taken, and settled, and that the part or share of such of my said sons so dying, of and in the said sum of 20,000*l.*, shall forthwith be raised, and laid out and invested in the purchase of a competent share, or competent shares of the parliamentary stocks, or public funds of Great Britain, in the names or name of my said trustees, or trustee, for the time being, upon such and the same trusts, for the benefit of his widow and child, and children, and subject to the same powers, provisos, and limitations over, as are hereinbefore directed, and shall not wait till all my sons shall attain the said age of 28 years, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. And my will is, and I do hereby direct, that in case all my sons shall refuse or decline to carry on the said trade or business, then, and in such case, I do hereby direct, that when all my said sons, W., F., T., and G., who shall live to attain the age of 28 years, shall have attained that age, and there shall be no after-born son or sons, or in case there shall be any after-born son or sons, when all my after-born sons, who shall live to attain the age

No. 14:

Upon the death of any son in the business before 28, leaving a widow or children his share in the 20,000*l.* immediately to be raised and invested, and not to wait till the other son or sons shall attain 28 years.

In case all the sons shall decline the business, then all the property and effects of the trade to be sold, and the 20,000*l.* to be raised

**No. 14.**

and invested for the purposes aforesaid, and the residue of the money to be applied as the residue of the capital, stock, &c. are before directed to be applied.

And in case all the sons shall die under 21, the business to be sold, and the produce invested for testator's wife and daughters, and their children, and his nephews and nieces, as before directed, with respect to the 20,000*l.*

of 22 years, shall have attained that age, the said trade, stock, and effects employed therein, shall be sold to the best advantage, and the debts due and owing to the said trade, shall be collected by my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor. And from and immediately after such sale as last aforesaid, they, my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, by and out of the money which shall arise by such sale, and which shall be collected as aforesaid, lay out and invest the said sum of 20,000*l.* in the purchase of a competent share, or competent shares of the parliamentary funds of Great Britain, in their own names, or in the names or name of the survivors or survivor of them, or of the executors or administrators of such survivor, upon the trusts, and to and for the intents and purposes hereinbefore mentioned, expressed, and declared of and concerning the same, and shall and do apply the residue of the money which shall arise by such sale or sales in such and the same manner as the residue of the capital, stock, debts, and effects, are hereinbefore directed and applied. And in case all my sons, as well those already born, as those hereafter to be born, shall depart this life under the age of twenty-one years, then my will is, and I do hereby direct, that the said capital, stock, goods, debts, and effects, shall be forthwith sold and disposed of, or collected in such manner as is hereinbefore directed in case all my said sons should refuse or decline to carry on the said trade or business, and that the whole produce thereof shall be forthwith placed out, and invested in the purchase of a competent share or competent shares of the parliamentary funds of Great Britain, in the names or name of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon such and the same trusts, for the benefit of my said wife and daughter, and their children, and my nephews and nieces as are hereinbefore mentioned, expressed, and declared of and concerning the stocks, funds, or securities, to be purchased with the said sum of 20,000*l.* in the event of all

my sons dying without leaving a widow, him or them surviving, or any child or children who shall live to attain the age of 21 years. Testator then gives several pecuniary legacies and small sums, for charitable purposes. And as to, for and concerning all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind or quality soever the same may be, both real and personal, which I shall be seised or possessed of, interested in, or in any manner entitled unto, in possession, reversion, remainder, or expectancy, at the time of my decease, I give, devise, and bequeath the same unto my said trustees, their heirs, executors, administrators, and assigns, according to the nature and quality thereof, upon trust, to sell and dispose thereof, either by public sale or private contract, and convert the same into money as soon as conveniently may be after my interment, and add the same to the capital of my said trade or business, and employ the same therein in such and the same manner, and to stand and be possessed thereof, subject to the legacies hereby given, upon such and the same trusts, and to and for such and the same intents and purposes as are hereinbefore mentioned, expressed and declared, of and concerning the residue of my said capital, stock, debts, and effects. And for facilitating the sale of my estate and effects in the manner hereinbefore mentioned, I do hereby direct that the receipt and receipts of my said trustees, or of the survivors or survivor of them, or of the heirs, executors, or administrators of such survivor, shall from time to time be a good and sufficient discharge, and good and sufficient discharges to the purchaser or purchasers of the said premises so to be sold as aforesaid, or any of them, or any part or parts thereof, or to any other person or persons, paying to them any other sum or sums of money under the trusts of this my will, and to his, her, and their respective heirs, executors, administrators, and assigns, for so much money as shall be therein acknowledged, or expressed to have been received. And that such purchaser or purchasers, or other person or persons, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application

No. 14.

All the residue of the testator's property, real and personal, to be sold, and the money applied in the same manner as the residue of the capital, stock, and effects, are before directed to be applied.

**No. 14.** thereof, or any part thereof. (1) And I do hereby nominate, constitute, and appoint my said wife, together with the said (trustees), to be executrix and executors of this my will, and in case of the death of any two or more of them before the trusts of this my will shall be fully executed and performed, then I do nominate, constitute, and appoint my two eldest sons, for the time being, when they shall respectively have attained the age of 18 years, to be executors of this my will,


Executors  
appointed.

Substitu-  
tionary  
executors  
named.

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(1) There is an obvious propriety in this provision. Where such a clause is left out, the best way to cure the omission is for the purchasers to see the whole of their purchase-money invested in the 3 per Cent. Bank Annuities, in the name of the executors or trustees who may thereupon execute deeds, declaring the money so invested to be the same money for which the estates (describing them) were sold, and that the money is so invested on the trusts of the will; and each purchaser should have one part of such deed declaring the trusts of the purchase-money. The Bank books will always, on inspection, afford evidence of the sum's having been actually invested in such a quantity of Stock, which will correspond with the precise quantity mentioned in the declaration of trust, and together they will be sufficient proof of a proper application according to the will, so as to absolve the purchaser. It was the opinion of the late Mr. Serjeant Hill, that the purchaser would then have a safe title without a decree; but otherwise he would not be safe, because he has notice of the trust. To obtain a decree, if a decree be necessary, the trustees, or any person or *prochein ami* for the infant *cestui que trusts*, may file a bill to compel a specific performance of the contract by the purchasers, and then the court will direct and confirm the sale. But purchasers of leasehold or chattel estates or interests will be safe without any decree, notwithstanding the omission to make the receipts of the trustees discharges, if the trustees are also *executors*, for the property in such subjects always vest in the first place, notwithstanding the dispositions of the will, in the executors. A testator cannot prevent them from being assets in the hands of the executors to go in a due course of administration. The power of sale is annexed to their office, and the purchaser is never obliged to enter into the account, or enquire into the necessity of any sale. *Whale v. Booth*, 4 T. R. 625. *Ewer v.*

in the place and stead of such two or more of them, my said wife and the said trustees, as shall so die before the trusts of my said will shall be fully executed and performed, and with all the same power and powers, authority and authorities, to all intents and purposes whatsoever, as such executrix or executors, who shall so happen to die, had or might have under and by virtue of this my will, at the time of his or her death. And I do hereby declare my will to be, that it shall and may be lawful to and for my said wife and the said (trustees) and also to and for my said two eldest sons, when they shall severally become entitled to prove and shall have proved this my will, and the survivors or survivor of them, and the executors or administrators of such survivor from time to time, if need be, to renew the lease of my dwelling-house and premises wherein the said trade or business is now carried on, or to purchase the fee-simple thereof, or of any undivided part or share thereof, or to take any other dwelling-house, shop or shops, warehouse or warehouses, or other premises, at such rent or rents as they shall think proper, for the purpose of carrying on the said trade or business, and to hire and employ any servant or servants, clerk or clerks, or any other person or persons whomsoever, to be employed therein, at such salary or wages as they, my said trustees and executors for the time being, shall think proper, and to repose in such servant or servants, clerk or clerks, or other person or persons, so much and such confidence, trust, power, or authority, in the conducting and carrying on of the same trade or business, and in the management, care, and disposal of the stock employed or to be employed therein, and in

**No. 14.**  
  
 Power to the trustees to renew the lease of the testator's dwelling-house, or to purchase other premises, with full discretionary powers for managing the trade.

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Corbitt, 2 P. Wms. 149. But the transaction must be clear of all fraud or collusion, for if it be tainted with these qualities the estate will be specifically followed into the hands of the purchaser. So where there is express notice of a debt of testator unsatisfied, and the sale is a contrivance between the purchaser and executor to defeat the debtor, the purchaser makes himself party to the devastation; see *Crane v. Drake*, 2 Vern. 616. *Nugent v. Gifford*, 1 Atk. 463. *Hill v. Simpson*, 7 Vez. Jun. 152. And if such sale be without valuable consideration it falls within the statute, 13 Eliz. c. 5. *Gilb. Eq. R.* 111.



**No. 14.** the receipt of any debt or debts to be contracted, in or by the carrying on the trade hereby directed to be carried on, as they my said trustees or the survivors or survivor shall in his, her, or their discretion think fit, provided that after any or either of my said sons shall become partners or partner in the said trade or business, such of them as for the time being shall be partners or partner therein, shall have a voice therein, as well as my trustees and executors for the time being, so as that in case of a difference in opinion, the majority of voices shall decide as hereinafter is mentioned; and also to adjust, settle, compromise and compound all accounts, reckonings, transactions, matters, and things, in which I shall be concerned or interested at the time of my decease, or which shall be opened or contracted, or shall arise after my decease, and to pay, on any evidences they shall think proper, any debts claimed from my estate, and also to dismiss any such servant or servants, clerk or clerks, or other person or persons; and (with such consent as aforesaid) to hire and employ any other or others in his, or their stead, and that from time to time, and as often as my said executors shall think proper. And I do hereby will, direct, and declare, that in all cases where my trustees, and executors for the time being, shall happen to differ in opinion, the matter of such difference shall be decided by the major part or number of them my said trustees and executors, and be acted upon accordingly. And I do hereby declare my will to be, that they my said executors, and their respective executors and administrators, shall not be answerable or accountable for any loss or damage which shall come or happen to the stock or capital to be employed in the said trade or business, by bad debts, decay of goods, suit or action, or suits or actions, in any court or courts of law or equity, or any other casualties or accidents whatsoever, or by reason of the trust and confidence which they or any of them shall or may place or repose in any servant or servants, clerk or clerks, banker, broker, or other persons with whom any part of the said trustmonies shall or may be deposited or lodged, for safe custody or otherwise, or for any other loss or damage which may happen about the execution of this my will, or all or any of the trusts hereby in them reposed; and that they my said

If the trustees and executors differ in opinion, the matter in difference to be decided by the majority.

trustees and executors, and their respective executors and administrators, shall not be charged or chargeable with or for any sum or sums of money, other than such as shall actually and respectively come to his, her, or their hands by virtue of this my will. And my will is, and I do hereby further direct, that it shall and may be lawful to and for my said trustees and executors, and each and every of them, by and out of all or any of the monies which shall come to their or any of their hands, by virtue of this my will, to deduct, retain to, and reimburse themselves, himself, and herself, and to allow his, her, or their, co-trustee, or co-trustees, all such costs, charges, and expences, as they respectively shall or may sustain, expend, or be put unto, in or about the execution of all or any of the trusts, hereby in them reposed, or in anywise relating thereto. And I do hereby revoke and make void all former and other wills by me at any time heretofore made, and do declare this only to be my last will and testament.

**No. 14.**  


In witness, &c.

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**No. 15.**

*A Will disposing of real and personal Property by a  
Testator leaving no Family.*

**THIS** is the last will and testament of me **A. B.** of, &c. First, I will that all such debts as I shall justly owe at the time of my decease, and my funeral and testamentary charges and expences, be in the first place paid by my executors hereinafter named. I give, and devise unto **C. D.** of, &c. all and every my messuages, lands, tenements and hereditaments, whereof I am seised in fee, situate, lying and being in

**No. 15.** ——— in the county of ——— and now or late in the several tenures or occupations of ——— and ——— or one of them, their, or one of their assigns, lessees or undertenants; to have and to hold all and every the said messuages, lands, tenements hereditaments and premises unto and to the use of the said C. D. and his heirs for ever. I give, devise and bequeath unto E. F. of ——— in the county of ——— all my copyhold messuages, lands, tenements and hereditaments, (which I have duly surrendered to the use of my will) situate, lying and being in the said county, and which now are or late were in the several tenures or occupations of ——— and ——— or one of them, their or one of their assigns, lessees or undertenants, to have and to hold all and every the said last mentioned messuages, lands, tenements, hereditaments and premises, with their, and every of their appurtenances, unto and to the use of the said ———, and the heirs of his body lawfully to be begotten; and for default of such heirs, then to the right heirs of me the said A. B., for ever. I give, devise and bequeath unto ——— of ———, in the county of ———, Esq. all those my messuages or tenements, with their and every of their appurtenances, now in the several tenures or occupations of ——— and ———, or their several lessees, undertenants or assigns, situate, standing and being in the parish of ——— in the county of ———, and all that my other messuage or tenement with the appurtenances, situate, standing and being in the said parish of ———, and near or adjoining to the said two last mentioned messuages or tenements, and now called, or commonly known by the name or sign of the ——— and heretofore in the tenure or occupation of ——— his undertenants or assigns, but which is now untenanted; and also all other my messuages or tenements, ground and hereditaments in ——— aforesaid with their appurtenances, to have and to hold all and every the said last mentioned messuages or tenements and premises, with their appurtenances (subject nevertheless to, and charged and chargeable with the annuity, yearly rent or sum of ———/ hereinafter mentioned) unto him the said ——— and his assigns, for and during the term of his natural life: and from and immediately after his decease I

give, devise and bequeath all and every the same messuages or tenements and premises, with their and every of their appurtenances (subject to and charged and chargeable with the annuity hereinafter-mentioned) unto and to the use of —, in the county of —, and the heirs of his body lawfully begotten, or to be begotten; and for default of such heirs, then to my own right heirs for ever; and I do hereby give, devise and bequeath unto —, wife of —, and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of —*l.* of lawful money of Great Britain, free and clear of and from all deductions or abatements, for or in respect of any taxes, charges, rates, assessments, or impositions whatsoever, to be issuing and payable out of all and every the said last-mentioned messuages, and tenements and premises, and to be paid and payable by equal half-yearly payments, at the two most usual feasts or days of payment in the year, that is to say, the feast of the Annunciation of the blessed Virgin Mary, and Saint Michael the archangel; the first payment thereof to be on such of the same feasts as shall first and next happen after my decease; and I do hereby charge and subject all and every the same messuages or tenements and premises, to and with the payment of the said annuity, yearly rent, or sum of —*l.* accordingly. And my will is, that in case the said annuity, yearly rent, or sum of —*l.* or any part thereof, shall be behind or unpaid by the space of 28 days, next over or after either of the aforesaid feasts whereon the same is hereinbefore directed to be paid as aforesaid, that then and so often it shall and may be lawful for the said —, (the annuitant) and her assigns, to enter and distrain upon all and every or any part of the said premises charged with the said annuity as aforesaid, and to dispose of the distress and distresses then and there found, according to law, as in the case of distresses taken by landlords for rents reserved upon leases for years, to the intent that thereby, or otherwise, the said annuity, yearly rent, or sum of —*l.* and every part thereof then in arrear, and all costs, charges, and expences, occasioned by the non-payment thereof, may be fully paid and satisfied. I give, devise, and

No. 15.

Testator  
devises an  
annuity to  
be issuing  
out of the  
messuages,  
&c. with  
power of  
distress.

**No. 15.** bequeath unto —, of —, in the county of —, all that my messuage or tenement (being part freehold and part leasehold) with the appurtenances, situate, standing and being in —, in the parish of —, and now or late in the possession or occupation of —, his undertenants or assigns; and also all that my freehold piece or parcel of ground, lying or being in or near an open field, commonly called or known by the name of the —, in the parish of —, and now or late in lease to —, and all those messuages, tenements, erections and buildings thereupon, or upon any part thereof now erected and built, and erecting and building, with their and every of their respective appurtenances; to have and to hold the said messuages or tenements, and piece or parcel of ground and premises last hereinbefore devised, with their and every of their respective appurtenances, unto the said —, and her assigns, for and during the term of her natural life, (she and they keeping the same in good repair); and from and immediately after her decease, I give, devise and bequeath the same messuages or tenements, pieces or parcels of ground and premises, with their and every of their respective appurtenances, unto the said —, and the heirs of his body lawfully to be begotten; and for default of such heirs, then to my own right heirs for ever. I give, devise, and bequeath unto the said —, all that my messuage or tenement, with the appurtenances in —, which I hold by, or under a lease from —, and all my estate, right, title, term and interest of and in the same premises, with the appurtenances; to have and to hold unto the said —, his executors, administrators and assigns, to and for his and their own use and benefit. I give and bequeath unto —, of, &c. the sum of —*l.* of lawful money of Great Britain, to be paid within three calendar months next after my decease. I give and bequeath unto —, —*l.* to buy him mourning. (Here the testator gave several other legacies.) All the said last-mentioned legacies I will and direct to be paid within one calendar month next after my decease. I give and bequeath the sum of —*l.* of like money, unto the managers of the — fund in —, to be disposed of as they shall think fit,

and the receipt of the treasurer for the same fund for the time being, to be a sufficient discharge to my executors for the same ; and I give and bequeath the sum of ——.l. of like money unto the managers and trustees of the charity-school in —, for the use and benefit of the said charity-school ; and I will that the receipt of two or three such managers or trustees shall be a sufficient discharge to my executors for the same. I give and bequeath the sum of ——.l. of like money to and for the benefit of the poor members of the society or congregation of —, in —, to be distributed in such manner and proportions, and to such objects as my executors hereinafter-named, or the survivor of them, shall think fit. I give and bequeath the sum of ——.l. of like money unto —, of, &c. and —, of, &c. their executors and administrators, upon the several trusts, and to and for the several purposes hereinafter-mentioned, and declared of and concerning the same, (that is to say) upon trust that the said — and —, (the trustees) and the survivor of them, his executors or administrators, shall and do, in their or his own names or name, or in the names of themselves or himself, and of such other person or persons as he or they shall think fit, from time to time put and place out the said sum of ——.l. in or upon some or one of the public or parliamentary stocks or funds of Great Britain, or on real securities at interest, according as they my said trustees, or the survivor of them, shall in his or their discretion or discretions think fit, and shall and do pay, apply and dispose of the clear yearly dividends, interest and produce thereof, as the same shall from time to time arise and be received (over and above what shall be sufficient to answer and pay the costs and charges attending the execution of the trusts by me hereby directed concerning the same ——.l.) unto and for the use and benefit of the minister or pastor for the time being, of the society or congregation of —, in —, for so long time as the said society or congregation shall subsist as a religious society of Protestant dissenters, and continue to meet and assemble together for the worship of God in their present place of religious worship, or elsewhere in — aforesaid, or the neighbourhood thereof. Provided nevertheless, and my will and mind is, and I do

No. 15.

Charitable bequests.

To trustees for the benefit of a society of Protestant dissenters.

**No. 15.** hereby expressly will, declare and direct, that in case at any time hereafter the said society or congregation shall be dissolved and broken up, or that the laws and statutes of this realm shall disallow and prohibit the same society or congregation from meeting together for religious worship, as Protestant dissenters are now by law tolerated to do, then and in either of the said cases, and when and as soon as the same or either of them shall happen, the said sum of —l. and all the interest and produce from thenceforth to arise and be received, shall sink and fall back into the residuum of my personal estate by me hereinafter given and bequeathed, and shall be, go, and remain to and for the use and benefit of such person or persons, who, for the time being, should or would have been entitled unto such residuum, by virtue of, and under this my will. I give and bequeath all my rings whatsoever, and such pieces of my plate as are marked with my own name and arms, and my household goods and furniture, and my wearing apparel, unto the said —, and all my books, and all other my plate (not hereinbefore bequeathed) and all my ready money and securities for money, arrears of rent, debts to me owing, and all my stocks in any of the public companies or funds, and all other my goods, chattels and personal estate whatsoever (not hereinbefore by me otherwise bequeathed or disposed of) I also give and bequeath unto —, of, &c. to and for his own use and benefit; and I do hereby make, ordain, constitute and appoint — and —, executors of this my last will and testament; and I give and bequeath unto the said —, the sum of —l. for his care and trouble as one of my executors and trustees. I do hereby authorise, empower, and direct my said executors, and the survivor of them, his executors and administrators in the mean time, from and after my decease, until the said — shall attain his age of 21 years, to manage and improve the estate and fortune of him the said —, by me hereby given him for his use and benefit, and to lease all or any part of his freehold, copyhold, or leasehold estates, and to lend and place out upon security or securities at interest, or to lay out in the public companies or funds, or otherwise improve according to his or their discretion or discretions, all or any part of the monies

Plate and  
household  
goods to—.

belonging to or arising from the said estates and fortune of the said —, and to pay unto and account with him the said —, for all such rents, interests, produce and improvements, as shall arise from or be made of, and produced by the said estates, monies and fortune hereby given, devised and bequeathed to him, when he shall attain his age of 21 years. And my will is, and I do hereby expressly declare, that my said executors and trustees, or either of them, their, or either of their executors or administrators, shall not be charged or chargeable with, or accountable for more of the aforesaid monies and estates, than he or they shall actually receive, or shall come to his or their respective hands, by virtue of this my will, nor with or for any loss which shall happen of the said monies and estate hereby by me given to the said —, or of the aforesaid sum of —/l. or of any part thereof, so as such loss happen without their wilful default and neglect; nor the one of them for the other of them, or for the acts, deeds, receipts, defaults or disbursements, the one for the other; and also that it shall and may be lawful for them my said executors, and each of them, their and each of their executors and administrators, in the first place, by and out of the said premises hereby devised to the said —, respectively to deduct and reimburse him and themselves respectively, all such loss, costs, charges and expences, as he or they, or any of them, shall sustain, expend, or be put unto, for or by reason of the performance of this my will, or the trusts hereby in them reposed; or the management and execution thereof respectively, or any other thing in anywise relating thereunto; and, lastly, I do hereby revoke, &c.

In witness, &c.



## No. 16.

*Will by a Citizen of London, containing Provisions  
for Daughters and a Son ; with Charities, and a  
provision for keeping a Tomb in repair.*

Recites a  
covenant  
to give or  
leave the  
sum of —l.  
to his mar-  
ried daugh-  
ter and her  
husband, in  
lieu and  
full of all  
her claim  
under the  
custom of  
London.

**THIS** is the last will and testament of me, A. B. of ——. First, I desire that my body may be interred in the most private manner, at the discretion of my executor hereinafter named ; and whereas my daughter —, wife of —, had only —l. at her marriage ; but I have lately paid and given to the said —, the further sum of —l. and have also covenanted and agreed to give or leave to them the said —, and — his wife, or the survivor of them, or their children, or issue, or other representative, either in my lifetime, or in and by my last will and testament, at the time of my decease, the further sum of —l. which they, the said —, and — his wife, have covenanted and agreed to accept in full for the advancement and preferment of her the said —, out of all such part and share as they, or either of them, can or may, or could or might claim or pretend to, of, in, or out of all, or any part of my personal estate, by virtue of the custom of the city of London, or otherwise (except such part thereof as I should or might freely and voluntarily give or leave to them or either of them by my last will and testament, or otherwise :) Now therefore, I do hereby give and bequeath the sum of —l. of lawful money of Great Britain, to be paid by my executor hereinafter named, within three calendar months next after my decease, unto the said —, and — his wife, or the survivor of them, or to such other person or persons, as for the time being shall be intitled to receive the same, accord-


Bequeaths  
such sum  
according  
to the co-  
venant.

ing to the true intent and meaning of my said covenant and agreement in that behalf entered into by me, and in full satisfaction and discharge of and for the same covenant and agreement. I give and bequeath unto such persons whose names shall, at the time of my decease, be found expressed or contained in any list, note, or other writing, written or signed by me, the several and respective sum and sums of money which shall be therein set down, mentioned, or expressed to be by me given to them respectively. I give and bequeath unto my nephew, —, of, &c. in the county of —, and —, brother of the said —, and to their heirs and assigns, for and during the natural life of my said daughter —, an annuity or yearly rent-charge of —*l.* of like money, to be yearly and every year issuing and payable out of all my manors, messuages, &c. in the county of —, upon trust, nevertheless, that the said —, and — shall and do pay, apply and dispose of the said annuity or yearly rent-charge of —*l.* unto such person and persons, and for such uses and purposes as she the said —, shall from time to time, notwithstanding her coverture, by any note or notes in writing, under her hand, direct or appoint, to the intent that the same may not be at the disposal of, or subject or liable to the control, debts, forfeitures or engagements of her present, or any after-taken husband, but only at her own sole and separate disposal, and for her own sole and separate use and benefit. (The like to two other daughters.) And it is my will and desire that the aforesaid annuities shall be paid to my said daughters, —, by two equal half-yearly payments, on the two most usual feasts or days of payment in the year (that is to say) the feast of St. Michael the Archangel, and the Annunciation of the blessed Virgin Mary in every year; the first of the said half-yearly payments to begin and be made on such of the said feasts as shall first happen next after my decease: and my further will is, that it shall and may be lawful to and for my said trustees, their heirs and assigns, from time to time, in case of non-payment of the said annuities respectively, or any of them, or any part of them, to raise the same by distress upon all or any part of the premises charged therewith, together with the costs and charges of

No. 16.

Gives to such persons as shall be named in any list or note to be written or signed by him, the sums therein expressed.

Gives annuities to his daughter, to be issuing out of lands, &c.

- No. 16.**  such distress. And whereas I have already sufficiently provided for my said daughters, — and —, at the time of their respective marriages, with their now husbands, and for which I have all their discharges ; and have now likewise sufficiently provided for my said daughter —, in manner aforesaid ; yet nevertheless, as a further provision for my said three daughters, for their separate use (over and above the several annuities hereinbefore given for their benefit, for their respective lives as aforesaid) I do hereby give and bequeath unto the said — and —, their executors and administrators, — *l.* capital stock in the funds of the united East India company, upon the trusts hereinafter mentioned concerning the same (that is to say) As to one full third part thereof, upon trust, that they my said trustees, their executors or administrators, shall and do pay, apply and dispose of the yearly dividends, interest, and produce thereof, as the same shall, from time to time (during the natural life of my said daughter —) arise or be received, into the proper hands of her my said daughter —, or otherwise to permit and suffer her my said daughter —, to receive the same to and for her own sole and separate use and benefit, to the intent that the same may not be at the disposal of, or subject or liable to the control, debts or engagements of her present, or any after-taken husband, but only at her own sole and separate disposal ; and upon further trust, that they my said trustees, their executors or administrators, shall and do, from and after the decease of my said daughter —, transfer and dispose of the said third part of the said — *l.* stock, unto all and every, or such one or more of the children or grand-children of her the said —, which shall be then living, in such parts, shares and proportions, manner and form, as she, notwithstanding her coverture, or whether she shall be sole or married, by her last will and testament in writing, or any writing purporting to be her last will and testament, or any codicil thereto, to be by her signed, sealed, and published in the presence of three or more credible witnesses, shall direct, limit, give or appoint the same; and in default thereof, then unto and amongst all and every the children of her the said —, which shall be living at the time of her decease, equally to be divided between them (if

Makes a further provision for his three daughters, out of East India stock,

more than one) share and share alike, and the child or children of such of them as shall be then dead, in manner aforesaid, and such child or children to have his, her, or their father's or mother's share only. Provided always, nevertheless, that in case my said daughter ——— shall have no such children or grand-children living, at the time of her decease, then my said trustees, their executors or administrators, shall assign and transfer the said third part of the said ———*l.* stock, unto ———, his executors and administrators, to and for his and their own use and benefit; and as to one other third part of the said ———*l.* capital stock, upon trust, that they my said trustees, their executors or administrators, shall and do pay, apply and dispose of the yearly dividends, interest, and produce thereof, as the same shall from time to time, (during the life of my said daughter ———,) (another daughter) arise or be received, unto the proper hands of her the said ———, or otherwise, &c. (as before.) And as to the remaining third part of the said ———*l.* stock, upon trust, &c. (for another daughter's benefit, as before.) And my will is, that the respective receipts of my said several daughters alone, under their respective hands, as well for their said several and respective annuities or rent-charges, as for their several parts and shares of the yearly dividends, interest and produce of the said East India stock, shall from time to time, notwithstanding their respective covertures, be good and sufficient discharges to the person or persons paying the same annuities and dividends, interest or produce, for so much thereof for which such receipts shall respectively be given. Provided always, and my will is, that my said three daughters, and their respective husbands shall, (in case my executor requires it) give him, within two calendar months next after my decease, a further and sufficient release and discharge from all their respective further claims and demands whatsoever, out of my said estate, by virtue of the said custom of the said city of London, or otherwise; and in case of their neglect or refusal so to do, then all and every of the gifts, devises, annuities, legacies and appointments by this my will made or given, to or for the benefit of them, or such of them so neglecting or refusing, shall cease and be void, for the benefit

Receipts of  
the daughters  
to be  
discharges.

Daughters  
to release  
all claims  
by virtue  
of the cus-  
tom of  
London.

**No. 16.** of my executor, his executors and administrators. And in case the said East India stock, or any part thereof, shall be redeemed or paid off, then my will is, that my said trustees, their executors or administrators, shall and do lay out the monies to be received for and in lieu of the stock so redeemed or paid off, in such stocks, funds, or other public or private securities, as my said three daughters shall respectively agree to; and that the monies so received and laid out, shall be subject to the same trusts, and for the same, or the like intents and purposes as are hereinbefore declared, of and concerning the respective shares of my said daughters, of and in the said ——. *l.* East India stock. I do hereby direct and appoint, that my executors do with all convenient speed after my decease, out of my personal estate, lay out so much as will be sufficient to purchase as much stock in any one of the public funds, or parliamentary stocks of Great Britain, as will produce the annual sum of ——. *l.* and do and shall be possessed of and interested in such last-mentioned stocks, funds, and securities, in trust for the churchwardens and overseers for the time being, of the said town of —, for the placing out one or more poor boy or poor boys, born or to be born in the said town and parish of ——— aforesaid, as far as the said yearly sum of ——. *l.* will extend, to be an apprentice or apprentices to some handicraft trade, or a mariner or mariners, and that the children of such persons of the said town and parish, who have been very industrious in their callings or way of living, for the support and maintenance of their families, and have not been in the poor's rate, shall have the preference to all others. *Pro-*

*vided nevertheless, that in case the monument erected in the parish church of ——— aforesaid, by my brothers and myself, to perpetuate (as much as in us lay) the memory of our dear parents, shall at any time want repairing, or the gilt letters upon the same shall be defaced, and become not legible, then and so often as the same shall happen, it is my will, that so much money be from time to time taken out of the said yearly sum of ——. *l.* as shall be sufficient to repair the said monument, and make the said gilt letters thereon legible, and from time to time to maintain and preserve the same in such condition; and in such years wherein such re-*

*If the E. I. stock should be paid off, the money to be laid out in other securities upon the like trusts.*

*Provision for keeping the tomb of testator's parents in repair.*

pairs shall be made, only the overplus of the said yearly sum (above what shall be sufficient for such repairs,) shall be employed towards placing out such poor boy, or poor boys, in manner aforesaid. And whereas my brother ———, late of ———, merchant, deceased, did (among other things,) by his will give to me the sum of ———*l.*, to be by me given away, distributed, divided and disposed of amongst such of my children, or other relations, in such sort and manner, and in such shares, and at such times, as I should think fit; now my will is, and I do hereby direct that the said sum of ———*l.* shall be distributed, divided and disposed of by my executor hereinafter named, within six months after my decease, to and amongst such of my children, and in such proportions and manner, as hereinafter mentioned and expressed, (that is to say) to my said daughter ———, the sum of ———*l.* (part thereof); to my said daughter ———, the like sum of ———*l.* (other part thereof); to my said daughter ———, the like sum of ———*l.* (other part thereof); and all the residue of the same ———*l.* to my daughter ———. And I give, devise and bequeath all and every my manors, &c., in the county of ———, or elsewhere within the realm of England, as well freehold, as copyhold and leasehold for lives, with their and every of their appurtenances, unto and to the use and behoof of my son ———, his heirs and assigns for ever, subject nevertheless as to my said estate in the said county of ———, to the aforesaid annuities, or yearly rent charges by me hereinbefore given thereout, or charged thereon, in trust, and for the benefit of my daughters, for their respective lives as aforesaid, or such of them as shall be subsisting. [Residuary devises and bequests, appointment of executors, and revocation of all former wills.]

In witness, &c.

Distribution of money left by his brother, according to a power given to the testator for that purpose, among his (the testator's) children.

## No. 17.

*Will of a married Woman, by virtue of a Power.*

Recites  
part of a  
settlement  
creating  
the power.

THIS is the last will and testament of me A. B., wife of C. D., of, &c. Esq. Whereas, in and by a certain indenture of three parts, bearing date on or about the ——— day of ———, and made or mentioned to be made between the said C. D., of the first part, me the said A. B., by my then name of ———, of the second part, and E. F., of, &c. merchant, and G. H., of, &c. of the third part, and made previous to, and in contemplation of my marriage with the said C. D., my now husband, divers leasehold messuages, &c. Bank stock, and East-India bonds of me the said A. B., were thereby assigned and transferred unto the said E. F., and G. H., their executors, administrators and assigns, in manner therein expressed, in trust nevertheless for the sole and separate use and benefit of me, the said A. B., and with full and absolute power for me, from time to time, notwithstanding my coverture, and whether I should be sole or married, by any writing or writings, under my hand and seal, attested by two or more credible witnesses, or by my last will and testament in writing, or any writing or writings purporting to be my last will and testament, to be by me signed, sealed, and published and declared in the presence of the like number of witnesses, to dispose of the said leasehold messuages, &c. Bank stock, and East-India bonds, or any part thereof, to such person or persons, and in such proportions and manner as I should think fit, as in and by the said indenture, relation being thereunto had, will more fully appear. Now in testimony of the sincere love and affection which I have, and justly bear, towards the said C. D., my dear husband, and by virtue of the power and powers, authority and authorities, to me reserved, and given in and by the said in part recited indenture, and of all other power and powers, authority

Executes  
the power  
in favour  
of her husband.

and authorities, anywise enabling me thereunto, I, the said A. B. do by this my last will and testament, or writing, purporting to be my last will and testament, to be duly signed, sealed, published and declared in the presence of the persons whose names are hereunder written as witnesses thereto, give, devise, bequeath, direct, limit and appoint all and every the said leasehold messuages or tenements, Bank stock, East India bonds, and all other my messuages, &c. stocks, bonds, goods, chattels, monies, and estate whatsoever and wheresoever, and of what nature or kind soever, whereunto I am intitled at law or in equity, or whereof I have any power to dispose, and all my estate and interest therein, unto my said husband, the said C. D., his heirs, executors, administrators and assigns respectively, to and for his and their own use and benefit absolutely; and I do hereby direct my said trustees, in the said recited indenture mentioned, to convey, assign and transfer over the same, and every part thereof to him and them accordingly; yet nevertheless my mind and will is, and I do hereby desire and request my said husband to give (out of what I have hereinbefore bequeathed to him,) unto his daughter ———, by his former wife, (in case he shall think fit, and in his judgment she shall prove deserving of the same) the sum of ———/ of lawful money of Great Britain, to be paid to her at such time or times, and in such manner or proportions, and under such restrictions in all respects, as he shall direct, and think may be most for her benefit. And I do hereby constitute and appoint my said husband, C. D., sole executor of this my last will and testament; and I earnestly desire of him that I may be buried where he himself intends to be buried, and that he would give proper directions in his will for that purpose, in case he should survive me; and, lastly, I do hereby revoke, &c. In witness, &c.

Signed, &c.



## No. 18.

*Short Will of an unmarried Woman.*

THIS is the last will and testament of me, A. B., of, &c. First, I desire to be decently and privately buried in the church or church-yard belonging to the parish in which I shall happen to die, without any funeral pomp, and with as little expence as may be ; and I give and bequeath unto the poor which receive alms of that parish in which I shall happen to die, the sum of —l. to be distributed in such proportions and manner, as my executrix hereinafter named, shall think fit ; also, I give and bequeath unto such of the children of my late sister ———, as shall be living at the time of my decease, the sum of —l., of lawful money of Great Britain, to be equally divided between them, share and share alike, and to be paid to them at their respective ages of twenty-one years, or days of marriage, which shall first happen ; and in case any of them shall happen to die before the age of twenty-one years, or marriage, then I give and bequeath the share or shares of her or them so dying, to the survivors of them, to be equally divided between them, payable as aforesaid ; but if only one of my said sister's children shall live to attain the age of twenty-one years, or be married, then to such survivor. Also, I give to my servant ———, the sum of ———l., of like lawful money, and all my wearing apparel, in case she shall be living with me at the time of my decease, but not otherwise. And I give and bequeath all my third part, share and interest of and in the family pictures which were my late mother's, unto my sisters ——— and ———, for their lives, and the life of the survivor of them, and after the death of the survivor of them, I give and bequeath my said part and share of the said pictures unto the eldest son of my

late sister, ———, which shall be then living, and I desire that he will never sell or dispose of any of them, but that they may always remain and continue in the family; also, all the rest and residue of my goods, chattels and estate whatsoever and wheresoever, or of what nature, kind or quality soever, (after payment of my just debts, legacies and funeral expences,) I give and bequeath the same and every part thereof, unto my said sister ———, whom I do hereby make sole executrix of this my last will and testament; and I do hereby revoke, &c. In witness, &c.

No. 18.

No. 19.

*Short Will of personal Estate for an only Daughter.*

THIS is the last will and testament of me, A. S., of ———, widow. First, I will and direct that all my just debts and funeral expences be fully paid and satisfied; and subject thereto, and to the payment of the three several pecuniary legacies of ———l. each, hereinafter bequeathed, I give, devise and bequeath all my goods, chattels, plate, jewels, monies, securities for money, South Sea annuity stock, debts, and other personal estate, of what nature or kind soever, and wheresoever, unto A. B., and C. D., of ———, and to their executors and administrators, upon the trusts, and for the purposes hereinafter mentioned, (that is to say) in trust that they the said A. B., and C. D., and the survivor of them, and the executors or administrators of such survivor, do and shall, by and out of the interest, dividends and produce of my said estate and effects, pay and apply the sum of 50l. a year, to and for the maintenance and education of my daughter ———, in such manner as they shall think fit, until she attains the age of twenty-one years, or shall be

**No. 19.** married; and upon her attaining that age, or day of marriage, which shall first happen, to pay, assign and set over the said trust estate and effects, and all interest and dividends due thereon, and produce thereof, and all securities whereon the same shall then be placed out or invested, to her, my said daughter, for her own sole use and benefit absolutely for ever: but in case my said daughter shall happen to die before she attains the age of twenty-one years, and unmarried, then I give 200*l.*, part of the said trust estate, to ten poor widows of clergymen of the church of England, who are of good life and conversation, and proper objects of charity, to be equally divided amongst them, share and share alike, at the discretion of my said trustees, or the survivor of them; and all the rest and residue of my said estate and effects I will and direct shall go to and be enjoyed by my nearest of kin, in the same manner and proportion as the same would pass, and be distributable by the statute for distribution of intestates' estates. And I do hereby constitute and appoint the said A. B., and C. D., executors of this my last will and testament, hereby revoking, &c.


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**No. 20.**

*A comprehensive Devise and Bequest of various descriptions of Property to Trustees, for the Sale and Accumulation of the Produce.*

I GIVE, devise, and bequeath all my stocks, funds, money, mortgages, and all lands, tenements, and hereditaments whatsoever, to which I am beneficially intitled, or which have been conveyed to, or vested in me by way of mortgage, security, or trust, and all my estate, right, title, and interest

of, in, and to such mortgaged premises, and all securities for money, and all my goods, chattels, and personal estate whatsoever, and wheresoever, and of what nature or kind soever, not otherwise by me disposed of, after and subject to the payment of my just debts, funeral expences, and the several legacies, bequests, and dispositions by me given, bequeathed, or made, or hereafter to be given, bequeathed, or made, and all my estate and interest therein, unto the said — and — their heirs, executors, and administrators respectively, according to the several natures and qualities of the same, upon the trusts following, (that is to say) upon trust, that they my said trustees, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, do and shall stand and be seised and possessed of the estates vested in me as a trustee, upon the trusts thereof respectively, and to re-convey, assign, and dispose of the mortgaged lands, tenements and hereditaments, when the principal and interest thereby secured respectively are paid off, and receive the principal and interest, which shall be due therefrom respectively, and give receipts for the same when paid; and also do and shall sell and dispose of all the real estates, to which I am beneficially entitled, and of which I have power to dispose, and also all the leasehold estates that I may hold at the time of my decease, from time to time, as they shall find purchasers for the same, or do and shall sell the same at public auction, or otherwise, at their discretion, subject nevertheless and without prejudice, to the privilege hereinbefore given to my said wife, of occupying, during her life, such of my leasehold houses as may be in my own occupation at the time of my decease; and also shall and do make sale of such other parts of the residue of my personal estate as shall be saleable. And I hereby declare, that the receipt or receipts of the said — and —, or the survivor of them, or the executors or administrators of such survivor, shall be effectual discharges for so much money as shall be therein acknowledged or expressed to have been received. And I do hereby declare my will to be, and direct that the said — and —, and the survivor of them, and the executors or administrators of such survivor, shall and do from time to time place out and invest

**No. 20.**  the monies which shall arise by sale of my real estate, and such parts of my personal estate as are saleable, including the leasehold estates directed to be sold as aforesaid, and also such monies as shall be collected, received, or got in from the other part of my personal estate as aforesaid, and the intermediate dividends, interest, and proceeds thereof, in the stock of the Bank of England, or on real or government securities, or in some of the public funds, in the names of the said ——— and ———, or the name or names of the survivor of them, or the executors or administrators of such survivor; which securities and funds, and all other securities and funds, in or upon which all or any of the said trust-monies, or any other trust-monies which shall come to their, or any of their hands, under or by virtue of this my will, or the trusts or powers herein expressed, and not hereinbefore directed to be otherwise disposed of, shall be invested, it shall and may be lawful to and for my last-named trustees, or the survivor of them, or the executors or administrators of such survivor, to alter and transpose at discretion. And I do hereby declare my will to be, that the dividends, interest, and proceeds of all such securities and funds, shall from time to time be accumulated and laid out on such securities or funds as aforesaid, in the names of the said ——— and ———, or the name or names of the survivor of them, or of the executors or administrators of such survivor, and that a like disposition shall be made of the dividends, interest, and proceeds of the securities and funds, in or upon which such accumulated dividends, interest and proceeds shall be so invested, and so from time to time, with respect to the future accumulated dividends, interest, and proceeds of such several and respective securities and funds, and of such other securities and funds, in or upon which any accumulated dividends, interest, and proceeds shall be invested, but so as no such accumulation be carried on or made beyond the term of 21 years, to be computed from the time of my decease (1). And my will is, and I do hereby further de-

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(1) The great question as to the ultimate period to which these trusts for accumulation might be extended, (which depended upon the extent of time during which the vesting and power of alienation

clare and direct, that the said ——— and ———, and the survivor of them, and the executors and administrators of such survivor, shall and do, from time to time, as convenient purchases shall be found, make sales of a competent part of the securities and funds, in or upon which the several and respective trust monies last-mentioned shall be in-

No. 20.

Accumulation Act.

of property might be legally suspended,) was determined in the much agitated, and solemnly decided case of *Thelluson v. Woodford*, see 4 Vez. Jun. 227. and 11 Vez. Jun. 112. In which case there was a devise of real estates of the annual value of near 5000*l.*, and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000*l.* to trustees, and their heirs, &c., upon trust, during the lives of the testator's sons, A., B., and C., and of his grandson D., and of such other sons as A. then had, or might have, and of such issue as D. might have, and of such issue as any other sons of A. might have, and of such sons as B. and C. might have, and of such issue as such sons might have as should be living at his decease, or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same, and the produce of timber, &c. in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates should be divided into three lots, and that one lot should be conveyed to the eldest male lineal descendant then living of A., in tail male; remainder to the second, &c., and all and every other male lineal descendant or descendants then living of A., who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was limited, successively in tail male; remainder in equal moieties to the eldest, and every other male lineal descendant or descendants, then living, of B. and C., as tenants in common in tail male, in the same manner with cross remainders; or, if but one male lineal descendant, to him in tail male; remainder to trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed that the trustees should stand seised, upon the failure of male lineal descendants of A., B., and C., as aforesaid, upon trust, to sell and pay the produce to his Majesty, his heirs, and successors, to the use of the sinking fund: the accumulation, till the purchases or sales

**No. 20.** vested, or call in a competent part of such trust monies, and lay out and invest the same from time to time in the purchase of freehold manors, messuages, farms, lands, tenements or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple, in possession, situate, arising, or being in some convenient place or places in that part of

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could take place, to go to the same purpose ; with a direction that all the persons becoming entitled, should use the surname of the testator only.

The validity of this will was opposed on several grounds, viz.—*as morally vicious*, being a contrivance of a parent to exclude every one of his issue from the enjoyment of even the produce of his property for nearly a century, and therefore an abuse of the allowance of the law for enabling persons to provide for the reasonable occasions of their families.—*As politically injurious*, being calculated to keep an immense property during the time aforesaid unproductive, and at the end of that period to create a fund, the revenue of which would be greater than the civil list ; the probable amount of the accumulated fund of one third being 19,000,000*l.*, and in case of a minority at the end of the period lasting 10 years, 10,802,373*l.* And should the *whole* property centre in one person, with a minority of 10 years, the whole accumulated fund would be 32,407,120*l.*—*As going beyond the legal boundary*, since in all the other cases, the lives during which the suspence was to be continued, were of those immediately connected with, or immediately leading to, the person in whom the property was first to vest.—*As a fraud upon the rule*, since by assigning for the period of suspence, a number of lives, whose average duration was equal to a given number of years, and thus indirectly making years, not lives, to constitute the period of suspence, property might be suspended for a century.—*As attempting to protract the accumulation during the lives of persons unborn at the time of the testator's decease*, the testator having included the lives of persons to be born within due time after his decease ; and though a child in ventre sa mere might be considered as in existence, where the limitation was for his own benefit, and he was to take, when born, in the character of heir, or where the subject of the trusts was personal estate, yet no cases could be mentioned, the subject being real property, in which a child in ventre sa mere has been held to be in existence, for any purpose except to limit the estate of the first devisee, or for the actual benefit of the child

Great Britain called England, free from incumbrances, except chief or quit rents, or other inconsiderable outgoings, together with such copyhold hereditaments, as may be intermixed, or be necessary or convenient to be held and enjoyed therewith, if any such there shall be, and the person or persons, who for the time being shall, by virtue of, or under the

No. 20.

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himself, being the substituted devisee.—*An objection was also taken upon the grammatical construction.* But all these arguments were over-ruled, and it was considered, that as the law stood at the time of Mr. Thelluson's decease, it was perfectly settled that the absolute vesting of property might be postponed, and the accumulation of it continued, during the lives of any number of persons in being, and for 21 years after the survivor's decease, and a further number of months, equal to the duration of pregnancy. And that as the term of suspence and accumulation, directed by Mr. Thelluson, was confined to the lives of persons in being at the time of his decease, or born in due time afterwards, or in ventre sa mere at his decease, and the life of the longest liver of them, without any reference to any further number of years, it not only did not exceed, but fell short of the boundary to which, according to the rules of law, it might have been extended. This was a plain executory devise, and every executory devise was good, which did not tend to make an estate unalienable beyond the time at which the remainderman, who was not in existence at the time of the limitation of the estate, would arrive at the age of 21. And the Court had no other criterion to judge of the inconvenience, except by analogy to the restraint, which the common law imposes upon the alienation of real property; and as to the point respecting the legal existence of a child in ventre sa mere, it was considered as decided by the case of *Long v. Blackall*, 7 T. R. 100. The Judges were unanimous. But it has been considered by the legislature as expedient *in future* to restrain the power of accumulation, and therefore the statute of the 39 and 40 Geo. 3. c. 98, was passed, by which, as will be seen by referring to it in the appendix of statutes in this volume, the power of settling and devising property for the purpose of accumulation, is restrained to 21 years after the death of the grantor or testator. And no person can now by any deed or will, or by any other mode, settle or dispose of any *real or personal* property, so as that the rents, and profits or produce thereof shall be wholly or partially accumulated for a longer term than the life of the grantor or testator, or the



**No. 20.** Limitations in this my will contained, be entitled in possession to my said mansion house, called ——— place, shall approve thereof, such approbation to be testified in writing ; and shall and do convey, settle and assure, or cause to be conveyed, settled and assured, all and singular the hereditaments so to be purchased with their respective appurtenances, to and for such uses, intents and purposes, upon such trusts, and with, under, and subject to such powers, provisos, limitations, declarations and agreements, as are herein declared or expressed, of or concerning the hereditaments hereinbefore by me devised, and which shall from time to time be subsisting undetermined, and capable of taking effect. And I do hereby further declare my will to be, that the dividends, interest, and annual proceeds of the several funds and securities in or upon which the said several and respective trust-monies, and the trust-monies accruing thereupon, shall at

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term of 21 years after the death of the grantor, or testator, or the minority of any person who shall be living, or in ventre sa mere, at the death of the grantor or testator ; and where any accumulation directed otherwise, such direction shall be void ; and the rents, issues, profits and produce during the time that the same are directed to be accumulated, contrary to the said act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed. But the act is restrained from applying to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of woods and timber.

Upon this statute, however, the Court of Chancery has held, that a trust by will for accumulation beyond the period thereby allowed, is void only for the excess ; and therefore, where the accumulation was directed until the age of 21, of the legatee, not born at the testator's decease, it was determined to be good for 21 years ; and it was said by the present Master of the Rolls, that if an accumulation was directed to continue for 24 years, it would be good for 21, within the determination in *Griffiths v. Vere*, decided by Lord Eldon. See *Griffiths v. Vere*, 9 Vez. Jun. 127. and *Longdon v. Simpson*, 12 Vez. Jun. 295.

Where a devise is made of the residue of the personal estate if the party shall attain 21, the profits in the mean time are construed to be given to the legatee, and are to accumulate. *Trevanion v. Viyian*, 2 Vez. 430.

the expiration of the said term of 21 years be invested, shall from the expiration of the said term of 21 years, go and be paid and payable to such person and persons, and in such course, order and manner, as the rents and profits of the several hereditaments hereinbefore by me devised, shall, by virtue of the limitations aforesaid, go, be made payable and applicable.

No. 20.

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No. 21.

*Power given in a Will to a person to whom a life estate is limited, to charge the estate with portions for younger children, varying in amount with the number of children to be provided for.*

PROVIDED always, and I do will and direct, that it shall and may be lawful to and for my said daughter Margaret, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereunto, to be signed and published by her in the presence of, and attested by, three or more credible witnesses, (but subject and without prejudice to the said annual sums or yearly rent charges hereinbefore limited by this my will, and the powers and remedies for recovering the same) to subject and charge all or any part of the said hereditaments and premises, hereinbefore limited in use to her for life, to and with the payment of any sum or sums of money for the portion or portions of all and every the child or children of the body of my said daughter, lawfully to be begotten, (other than and except, and not being an eldest or only son (1), entitled for the time being to

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(1) Every child, except the heir, is considered in equity as coming within the description of younger children; thus the eldest daughter, where there is a son, or where the estate by a settlement goes

Who in equity are younger children.

**No. 21.** the hereditaments and premises, or any part thereof, either in possession or in remainder, expectant on the decease of my said daughter, under the limitation contained in this my will,) not exceeding the amount hereinafter mentioned, that is to say, if there shall be no more than one such child, (other than and except as aforesaid,) not exceeding the sum of 5000*l.* for his or her portion ; if there shall be two such children, and no more, (other than and except as aforesaid,) not exceeding 10,000*l.* for the portions of such two children ; if there shall be three such children, (other than and except as aforesaid,) not exceeding 15,000*l.* for the portions of such three children ; and if there shall be four or more such children (other than and except as aforesaid,) not exceeding 20,000*l.* for the portions of such four or more of them ; with interest for such portion or portions ; the same respectively to be paid to such child or children at such age, day or time, or ages, days or times, and if more than one in such parts, shares, and proportions, and subject to such conditions, restrictions, and limitations over, such limitations over to be for the benefit of some or one of such children, (other than and except as aforesaid,) as my said daughter Margaret shall deem prudent and expedient, and by any deed or deeds, instrument or instruments in writing, so to be sealed, delivered and attested as aforesaid, or by such last will and testament, codicil or codicils thereunto so to be signed, published and attested as aforesaid, shall direct, limit, or

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all to a remainder-man, is a younger child in equity, *Beale v. Beale*, 1 P. Wms. 244. And if a younger son becomes eldest, he is excluded, *Lord Teynham v. Webb*, 2 Vez. 198. Indeed, in *Lady Lincoln's* case, one, who was a younger son at the death of the testator, and the tenant for life, becoming eldest before 21, till which the portions were subject to survivorship, on the whole will was held not entitled, 10 Vez. Jun. 166.

Even an eldest son, not provided for, may be considered as a younger, of which see a curious instance in *Duke v. Doidge*, 2 Vez. 203, in the note. And where the descent is according to the custom of Borough English, without doubt, upon the same principle, the eldest son would be a younger to this purpose in equity,

appoint; but so, nevertheless, that if such children, so entitled to have or be provided with portions as aforesaid, shall be reduced to three, such three children shall not be entitled to have more than 15,000*l.* raised for their respective portions; and if such children shall be reduced to two, such two children shall not be entitled to have more than 10,000*l.* raised for their respective portions; and if such children shall be reduced to one, such one child shall not be entitled to have more than 5000*l.* raised for his or her portion. No. 21.

(Power to create a term of years for raising the said portions.)

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No. 22.

*Devise of an Advowson to Trustees to present a certain Person to the next Avoidance.*

I GIVE and devise my advowson and right of patronage of and to the living of H., in the county of —, to F. P., of, &c. and W. L., of, &c. and their heirs, to the use of the said F. P. and W. L., their heirs and assigns, in trust that they or the survivor of them, or the heirs or assigns of such survivor, shall and do present I. T. of, &c. to the next turn or avoidance thereof, and subject thereto, upon trust to convey the same to and for such uses, intents, and purposes, upon such trusts, and under and subject to such powers, provisos, limitations, and declarations, as in and by this will are limited, declared and expressed, of and

**No. 22.** concerning my other hereditaments and real estate in the county of, &c. or such of them as shall be subsisting and capable of taking effect.

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**No. 23.**

*Words of a Will whereby a Testator charges his Debts, Legacies, &c. upon all his Estate.*

THIS is the last will and testament of me, M. H., of, &c. made this —— day of ——, in the year ——. I charge all my real and personal estate, of what nature or kind soever, with the payment of all my debts, funeral expences and legacies, as well such as I shall hereby give, as such other legacies and annuities as I may hereafter give by any codicil or codicils to this my will (1).

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(1) By such words in a will duly executed, a testator enables himself to lay any number of additional legacies on the land by a subsequent testamentary disposition unexecuted. See Vol. I. ch. 1. s. 6. of this treatise.

To entitle a legatee to recover his legacy out of the real estate, there seems to be no necessity for proving the will in the Spiritual Court. 3 Atk. 361.

What words are necessary to charge the specific devisee with legacies.

It is to be observed that words importing clear intention to charge the realty are necessary to make the land in the hands of a specific devisee subject to legacies; therefore, if a clause, either at the beginning or end of a will, run thus, "First, I will and direct that all my debts, legacies and funeral expences shall be fully paid," these words will not give the legatee place of the *specific* devisee, though perhaps by such words the residuary real estate might be charged with the legacies. And perhaps also this would be considered as sufficient to charge even *specific* devisees in their order, (for the general devisee and the heir come first into contri-

## No. 24.

*Clause to prevent an Annuitant under the Will from parting with his Annuity.*

AND my will further is, and I do hereby expressly declare and direct, that in case my said nephew, A. B., shall alien, sell, assign, incumber or transfer, or in any manner dispose of or anticipate the said annuity or yearly sum of 200*l.* or any part thereof, then and in such case, and from and immediately after such alienation, sale, assignment, or transfer, the said bequest so made thereof as aforesaid, and the use and estate so given to him therein, shall cease and be void, to all intents and purposes as if the same had not been mentioned in this my will, or as if the said C. K. were naturally dead.

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bution) with the *debts*. See *Knightley v. Knightley*, 2 Vez. Jun. 328. But the Lord Chancellor doubted of the distinction in this respect, in *Williams v. Chitty*, 3 Vez. Jun. 545. The Master of the Rolls, however, maintained the distinction, in *Shallcross v. Finden*, 3 Vez. Jun. 738. And see 3 P. Wms. 91. *Harris v. Ingledew*, ib. 358.

In this last case the words at the beginning were, "After payment of all my just debts, funeral expences;" and it was clearly held that the *debts* were charged by these words,

## No. 25.

*Devise of Copyholds and Leaseholds, for lives and years, to Trustees, to the same uses as the Freehold.*

AND I give and bequeath all my customary, or copyhold (1) messuages, lands, and hereditaments, and also all my messuages, farms, lands, tenements, and hereditaments

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Of the necessity for the party's having the legal estate in him at the time of his surrendering his copyhold to the use of his will.


(1) The necessity for, and the operation of a surrender of a copyhold estate to the use of the will made, or to be made, has been considered. To what has been observed, it may be here added, that for the will to have its legal effect, it is necessary that the party, when he makes the surrender to the use of his will, should have the legal estate, *Doe d. Ibbott, v. Cowling*, 6 T. R. 63. otherwise the surrender to the use of the party's own will, can have no effect, any more than if the surrender were made to a stranger. Thus, where a copyhold was surrendered to J. S. on the 10th October, 1793, and the surrenderee afterwards, and before he was admitted, surrendered the same to the use of his will; and on the 17th June, 1795, and not before, the surrender was presented and the testator admitted; it was held that the surrender to the use of the will was inoperative, and that the admittance did not relate; for before the surrender to the testator was executed by the admission, the legal estate was wholly in the surrenderor, and the surrenderee could not enter without being a trespasser to the surrenderor, and the surrenderee could not have maintained ejectment unless he was admitted before the trial. And as to the question of *relation*, it was held that the admission could not *relate* so as to validate the surrender by J. S. to the use of his will, for though relation will in many cases help acts in law, it will not help the acts of the party, that is, it will not make void acts of parties good by the fiction of law. See the learned judgment pronounced by Lord Ellenborough, in the case of *Doe* on

whatsoever, which I hold by virtue of, or under any grant, lease, or demise, from the Crown, or any college in either of the Universities, or from any bishop, dean and chapter, or other person, body politic or corporate, ecclesiastical or civil, for any term of life or lives, or years determinable on deaths, or usually renewable at certain times and periods respectively, and also all my leasehold messuages, lands, and tenements, which I hold for any term or number of years (in case any such there be) unto the said ———, and ———, their heirs, executors, administrators and assigns respectively, according to the nature and quality of the same respectively, for and during all my estate and interest therein, upon trust that my said trustees, and the survivor of them, his heirs, executors, and administrators, shall and do settle and assure the same, so and in such manner as that the clear residue of the rents, issues, and profits of the same copyhold and leasehold premises respectively, may be received, taken, and enjoyed by and for the use and benefit of such person or persons as for the time being shall, by virtue of this my will, and the settlement to be made according to the directions hereinbefore contained, be entitled to any

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dem. *Tofield v. Tofield*, 11 East, 266. And for the doctrine of relation the reader is referred to the 8th section of chapter 2 of this treatise. The reader will observe, that in this case there was an original defect of estate and not of a surrender, so that this was not a case for equity to supply a surrender, which it would have done if the testator had had the legal estate, and had only omitted the surrender to the use of his will, as the wife was the devisee. But in another view of the equity of the case, it should seem there was a good ground of relief; since the first surrender was for valuable consideration, and gave the surrenderee an equitable interest, and it has always been the rule of equity, that where the party has the beneficial interest only in copyhold lands, he may devise them, and they will pass by his will as well as any other lands, without a surrender. See *Tuffnell v. Page*, 2 Atk. 37. *King v. King*, 3 P. Wms. 360. *Macey v. Shurmer*, 1 Atk. 390. *Allen v. Poulton*, 1 Vez. 121. *Macnamara v. Jones*, 1 Bro. C. C. 481. *Daire v. Beversham*, 4 Ch. Rep. 76.



**No. 25.**  estate of freehold and inheritance, of and in my said manors, hereditaments, and premises in the said counties of — and —, and until some persons entitled to an estate of inheritance shall, by good assurances in the law, become seised of the said manor, hereditaments, and premises in fee simple, in possession; and immediately upon or after that event, the trustees in the said settlement of the said copyhold and leasehold premises, shall be thereby directed and required to surrender, assign, and assure the said copyhold and leasehold lands, tenements, and premises, with their and every of their appurtenances, and all estates, terms, and interests of my said trustees, of, and in the same, unto such person or persons so seised of, or entitled to the inheritance of the said manors, messuages, lands, and hereditaments aforesaid, by such deeds, writings, instruments, surrenders and assurances, as by such person respectively, or by his counsel learned in the law, shall be reasonably advised or required: and also upon trust that my said trustees, and the survivor of them, his heirs, executors, or administrators, in the mean time, and until such settlement shall be made, do and shall by and out of the rents and profits of the said leasehold premises, pay the rents and perform the covenants reserved by the original and subsisting leases, and also by and out of my personal estate renew the leases of the same premises, and take new leases thereof respectively, in their own names, when and as it shall be usual and requisite, and also from time to time make such proper surrenders of the leases subsisting, as shall be requisite, and necessary or incident to such renewals, and also do and shall, by and out of my said personal estate, or the rents and profits aforesaid, pay and discharge the fines and fees of admissions to, and surrenders of, my said copyhold lands.

## No. 26.

*Devise of the residue of Testator's personal estate, in trust, to sell, call in, dispose of, and convert into money, such part as shall not consist of stock, or real securities, and invest it in securities, and thereout make a marriage provision for a collateral relation.*

AND as to all the rest, residue, and remainder of my personal estate, money in the public funds, and money out at interest, and securities for money, arrears of rent, goods, chattels and effects, of what nature or kind soever, not herein specifically bequeathed, I hereby give and bequeath the same, and every part thereof, unto the said ———— and ————, their executors, administrators and assigns, upon trust, that they, the said ———— and ————, and the survivor of them, and the executors or administrators of such survivor, shall and do, as soon as conveniently may be after my decease, receive, collect, call in, dispose of, and absolutely convert into ready money, so much and such part of the said residue of my personal estate to them bequeathed, as shall not, at the time of my decease, consist of stock in the public funds, or of government or real securities; and shall and do lay out and invest all such sum and sums of money, as shall arise by converting into ready money all such part of the said residue of my personal estate as aforesaid, either in the public funds, or on real or government securities, at interest, and shall and do stand and be possessed thereof, and also of all such part of the residue of my personal estate as shall at the time of my decease, consist of stock in the public funds, or of government or real securities respectively, and of the interest, dividends and annual produce thereof, upon the trusts, and subject to the directions and declarations hereinafter contained (that is to say,)

**No. 26.** upon trust, that my said trustees, or the survivor of them, and the executors, administrators or assigns of such survivor, shall and do, by and out of the same residue, raise —*l.* of lawful money of Great Britain, and pay the same to the said —, or to such person or persons as she shall, by any deed or writing, executed by her, in the presence of two or more credible witnesses, direct or appoint, immediately upon, or in certain prospect of her marriage, as and for her pecuniary fortune or marriage portion, and for which her receipt alone, notwithstanding her coverture, or that of her legal assignee, shall be an effectual discharge, so as an adequate and proper jointure and provision for her and her issue be settled and secured in consideration thereof. Provided that in case my said niece shall die without having been married, then the said sum of —*l.* shall not be raised and paid at all, but shall sink into, and become a part of, the residue of my personal estate, for the benefit of the person or persons who shall become entitled thereto under this my will.

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**No. 27.**

*Bequest of Jewels, &c.*

I ALSO give to my said wife the use of all my jewels and pearls, usually worn by herself, during her widowhood ; and upon the marriage or decease of my said wife, which shall first happen, I give the same jewels and pearls to the said E. A., and G. C., their executors, administrators, and assigns, upon trust, that they permit and suffer them to be used and enjoyed by the person or persons, who, from time to time, shall, by virtue of the limitations to be contained in the settlement so to be made as aforesaid, be for the time being entitled to the immediate freehold of the estates to be therein comprised, but so as that the same

shall not vest in any child or children of any person or persons to be therein made a tenant or tenants for life, who, being a son or sons, shall not attain the age of 21 years, or being a daughter or daughters, shall not attain that age, or marry. Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for my said son W., and after his decease, my son T., and my grandson L., when and as by virtue of any of the limitations to be contained in the settlement or settlements so to be made as aforesaid, they shall respectively be entitled to the immediate freehold of the hereditaments, in such settlement or settlements to be comprised, by any deed or deeds, instrument or instruments, to be by them respectively sealed and delivered, in the presence of, and attested by, two or more credible witnesses, or by their respective last wills and testaments, or any codicil or codicils thereto, to be by them respectively signed and published in the presence of, and attested by, the like number of witnesses, <sup>to</sup> direct or appoint, that any woman or women, whom they may respectively marry, shall have the use of all or any part of the said jewels or pearls, during her or their widowhood, or respective widowhoods; and my said trustees shall permit and suffer the same to be used and enjoyed by her or them accordingly. Provided always, and I do hereby direct the said E. A., and G. C., and the survivor of them, and the executors, administrators and assigns of such survivor, at the request of the person or persons, who, for the time being, shall be entitled to the use of the aforesaid jewels and pearls, by virtue of this my will, to have them, or any of them reset, so that their value shall not thereby be lessened, the expence of such resetting to be paid out of the fund hereinbefore directed to be established, or to exchange the same, or any of them, for others of equal or greater value (except with respect to my family pearl necklace, the ruby ring set with diamonds, the emerald ring set with diamonds, and the sapphire ring, with the figure of ——— engraved upon it, which I desire may be preserved in their present state). Provided, and I do hereby declare my will to be, that it shall and may be lawful to and for the said L. C. H., to have the

No. 27.

Power for the tenants for life as they come into possession to appoint the use of the jewels to their widows respectively for their lives.

Power for the trustees to have them reset.

**No. 27.** use of my pearl bracelets, with diamond clasps (1), during her life, unless she shall marry again ; but that immediately upon her decease, or second marriage, which shall first happen, the same shall vest in the said E. A., and G. C., or the survivor of them, his executors or administrators, upon such trusts as hereinbefore declared or expressed of or concerning the jewels aforesaid.

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**No. 28.**

*Appointment under a power for the benefit of  
Testator's younger children.*

**AND** whereas my surviving daughters have respectively attained the age of 21 years, but my younger son is still an infant, of the age of 15 years ; now I, the said A. B., by force and virtue, and in exercise of the said power and authority, do by this my last will and testament in writing, signed and sealed by me, in the presence of, and attested by, the three credible persons whose names are intended to be hereunder written as witnesses to my signing, sealing, and publishing this my last will, direct and appoint the sum of ————l. residue of the said sum of ————l. or such other sum of money as shall be to be raised under

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(1) If a testator bequeaths a certain thing, which he specifies as being his own, the legacy will not have its effect, unless that thing be found extant among the testator's property, as, if he bequeaths it by the words, 'my watch, my diamond ring,' &c. ; but if he says, 'I bequeath a watch,' or, 'a diamond ring,' the legacy will have its effect, if the value and species are described so as to render it sufficiently certain : and this is the rule of the civil law ; Do-mat. 2 V. 759, s. 21.


the trusts of the said term of 99 years, to be raised immediately after my decease, out of my said family estates, under the trusts of the said term, to be divided amongst my said three children, Mary Caroline, Elinor and Edward, and any other child or children whom I may hereafter have by the said ———, in the shares and manner hereinafter mentioned, (that is to say) to be paid and divided among all my said younger children, in equal shares and proportions; the respective shares of my said daughters ——— and ———, to become vested and payable upon my decease, and to carry interest from that time at the rate of ——— per cent per annum; and the share of my said son E. to be paid on his attaining the age of 21 years; and the share and shares of such child, or such of the children I may hereafter have by the said ———, as shall be a daughter or daughters, to be paid at her or their age, or respective ages of 21 years, or day or respective days of marriage, which shall first happen, and as shall be a son or sons, at the age of 21 years. And I do hereby direct and appoint, that the trustees or trustee for the time being of the said term of years, shall levy and raise, and pay to or for my said son E., and such child or children as I may hereafter have by the said ———, from the time of my decease till they respectively shall become entitled to receive their shares of the said sum of ———l., or such other sum of money as aforesaid, for or towards his or her maintenance and education, any yearly sum not exceeding the yearly sum of 200l. a piece. And my will is, and I do hereby declare, direct, and appoint, that in case my said son E., or any such child or children as I may hereafter have by the said ———, shall die before his or her share, or their respective shares of the said principal money shall become payable, that then the share and shares of him, her or them, or any of them so dying, shall go to and be divided between my surviving children, if more than one, in equal shares and proportions, and if only one, then the whole shall go to such one surviving child, and shall be considered as part of the original portion or portions of such child or children.

## No. 29.

*Clause in a Will, directing a Power of leasing and of selling and disposing, to be inserted in the Settlement directed to be made of the Testator's real Estates.*

AND I do hereby declare my will to be, that in such settlement there shall be contained a power to enable the said E. A., and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, during the continuance of the said term of 2000 years hereby limited and created, and after the determination thereof, for the person or persons, who for the time being shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore devised and comprised in the same term, for an estate of freehold, to grant, demise, limit, or appoint the said hereditaments, or any of them, or any part thereof, for any term or number of years, not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions: and also a power to enable the said E. A. and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request, and by the direction, of the person or persons who, for the time being, shall be entitled to the hereditaments to be comprised in the settlement hereby directed to be made as aforesaid, for an estate of freehold, either in possession or in remainder, immediately expectant on the said term of 2000 years, signified by some writing, under the hand and seal, or hands and seals, of such person or persons, attested by two or more credible witnesses, to make sale of, or to convey in exchange for, or in lieu of other hereditaments, all or any of the hereditaments to be comprised in the settlement so to be made as aforesaid, and the fee simple and inheritance thereof, as well

as for the said term of 2000 years, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said E. A. and G. C., or the survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in the purchase of other freehold lands of inheritance, or of copyhold lands convenient to be held with the lands hereby devised, or any of them, or so to be purchased or taken in exchange, in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to the uses of the settlement hereinbefore directed to be made as aforesaid, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding.



No. 29.

## No. 30.

*Clause in a Will, by which the Testator, after limiting his real Estates to his Son for Life, Remainder in the strict Form to the Sons of such Son successively in Tail Male, limits the same to his two Daughters, in Moieties, with Survivorship, for Life, to take exclusively of their Husbands, with the same Remainders in Tail to their respective Children in succession, with cross ultimate Remainders; the whole being directory of a Settlement to be made.*

AND for default of such issue, to the use of trustees and their heirs, during the lives of my said two daughters A. B. and C. D., and the life of the survivor of them, in trust, to



**No. 30.** pay the rents, issues, and profits thereof to such person or persons respectively, as they my said daughters respectively, and the survivor of them, by any writing or writings under their respective hands, or the hand of such survivor, shall from time to time, as the same respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have the power of disposing of more than a moiety each, of the said rents, issues, and profits, and for want of such direction and appointment, into the proper hands of them respectively, in moieties, whilst both of them shall be living, and of the survivor of them, for their and her sole and separate use, exclusively and independently of any husband with whom they respectively may happen to intermarry, and not to be in anywise subject to the controul, debts, or engagements of their respective husbands : and my will is, that their respective receipts in writing, and the receipt of the survivor, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents, issues and profits to be paid as aforesaid, shall be good and effectual releases and discharges for the rents, issues and profits therein mentioned to be received : and upon further trust, during the lives of my said daughters, and the life of the survivor of them, to preserve the contingent uses and estates to be limited as hereinafter mentioned, and from and after the decease of the survivor of them, my said daughters, as to one undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter, A. B., successively, according to their respective seniorities, in tail male, and for default of such issue to the use of the first and other sons of my said daughter, C. D., successively, according to their respective seniorities in tail male ; and as to the other undivided moiety, or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter, C. D., successively, according to their respective seniorities, in tail male, and for default of such issue to the use of the first and other sons of my said daughter A. B., successively, according to their respective seniorities, in tail male ; and from and after the decease of both

my said daughters, and failure of issue male of both their bodies as aforesaid, then, as to the entirety of the same hereditaments, to the use of ———, his heirs and assigns. No. 30.

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No. 31.

*Devise of a Sum to be applied in releasing poor Prisoners.*

I will and direct that my executors shall, within ——— months after my decease, lay out and expend the sum of 1000*l*. in releasing and discharging such poor prisoners who shall be imprisoned at my decease in ——— prisons, or one of them, for debt, as my executors shall think fit, having regard, in the application of the said sum for this purpose given, to such poor prisoners as shall be then in prison, whose conduct has been virtuous and industrious, whose families are in want, and whose confinement has been owing to losses and misfortunes, and not to idleness, drunkenness or debauchery (1).

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(1) If the testator is desirous of making this legacy cease in case of his giving the said sum, or to cease as to a proportionate part, in case of his giving any less sum, in his life-time, it will be better for him to reserve this to be directed by a codicil, which may determine the quantum, and ascertain the fact, by a statement upon the face of it, and thus the executors will be relieved from a troublesome enquiry, during which it might be necessary to suspend the execution of the testator's bounty.

## No. 32.

*A Preamble to a Will, the Testator being about to go to Sea.*

IN the name of God, Amen. I, C. D., of ———, mariner, being in good health, and of sound mind, and being about to depart this kingdom, on a voyage to ———, in the kingdom of ———, and having regard to the dangers of the seas, and the uncertainty of life, do, in case I die before I return to Great Britain (1), make this my last will and testament, as follows, that is to say, &c.

## No. 33.

*A general Form of a Codicil to a Will, where only some few additional Legacies are given.*

WHEREAS I, A. B., of ———, have made, and duly executed my last will and testament, in writing, bearing date, &c. Now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof; and I do hereby give, bequeath, &c. In witness whereof, I, the said A. B., have to this codicil set my hand and seal, this ——— day of ———.

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(1) See the case of *Parsons v. Lance*, Ambl. 557. This will is avoided by his return.

## No. 34.

*Another general Form of a Codicil to a Will, where  
several Legacies are revoked.*

WHEREAS I, A. B., of —, &c. have by my last will and testament, in writing, duly executed, bearing date, &c. given and bequeathed to, &c. Now I, the said A. B., being desirous of altering my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof; and I do hereby revoke the said legacies by my said will given to —, and I do give to each of them the said — and — the sum of — l. only (1); and I give unto, &c. And I do ratify and confirm (2) my said will in every thing, except where the same is hereby revoked and altered as aforesaid.

In witness, &c.

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No. 35.*A Codicil executing a Power given by a Settlement.*

A CODICIL to be added to, and to be taken as part of the last will and testament of me M. B., of N. and W., in

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(1) Substituted legacies stand charged upon the same fund as the original legacies.

(2) All codicils are part of the will: therefore a codicil merely for a particular purpose, and confirming the will in other respects, does not revive any part of the will which had been revoked by a former codicil; *Crosbie v. Macdowall*, 4 Vez. Jun. 610.


**No. 35.** the county of L. Whereas by indenture of lease and release, bearing date respectively the — and — days of June, in the year of our Lord 1721, and made or mentioned to be made between me the said M. B. of N. and W., by the name of —, of the one part, and M. K. of A., in the county of Cornwall, Esquire, and T. R., of the Middle Temple, Esquire, of the other part, I, the said M. B. of N. and W. for the settling of the manors, lands, tenements and hereditaments therein mentioned, and in consideration of 10*s.* of lawful money, did bargain, sell, alien, release and confirm unto the said M. K. and T. R., the manors, advowsons, messuages, lands, tenements and hereditaments therein contained, and amongst others, all that the manor, or reputed manor of L., with the rights, members, and appurtenances thereof, in the county of B., and the messuages, lands, tenements and hereditaments of me the said M. B., of N. and W., in L. and F. aforesaid, or either of them, in the said county of B., to hold to the said M. K. and T. R., their heirs and assigns for ever, to and for the uses, intents and purposes, and subject to the powers, limitations and provisos thereafter expressed and contained, of and concerning the same ; in which said indenture of release is contained a proviso, that it should and might be lawful to and for me the said M. B. of N. and W., from time to time, and at any time or times, during my life, by any deed or writing, to be sealed and delivered, or by my last will or testament to be signed by me in the presence of two or more credible witnesses, to revoke or alter all or any of the uses or trusts thereby limited or appointed, or to limit any other or new estate, uses, trusts or dispositions, of or concerning the premises or any part thereof: and whereas by indenture, bearing date the fourteenth day of October, in the year of our Lord —, and made, or mentioned to be made between me the said M. B. of N. and W. of the one part, and T. B. of S., in the county of E. Esquire, J. L. of the parish of St. J. within the liberty of the city of W., in the county of M., Esq., and E. R., of the parish of St. —, in the said county of M., Esq., of the other part, reciting the said hereinbefore recited indenture, and also reciting two several other indentures made subsequent thereto, whereby the uses of and concerning the said premises, in and by the

said first-mentioned indenture limited and declared, were altered and revoked of and concerning the said premises, but subject to a like proviso for altering and revoking the same, and appointing new uses as in the said first recited indenture contained; I the said M. B., of N. and W., in pursuance of the said power to me reserved, did revoke the uses in and by the said several recited indentures declared of and concerning the said premises, and did limit, appoint and declare the same premises, to and for the uses and trusts, and under the provisos thereafter expressed concerning the same; in which indenture is also contained a proviso, that it should and might be lawful to and for me the said M. B., of N. and W., from time to time, and at all times thereafter, during my life, by any deed or deeds to be by me executed in the presence of two or more credible witnesses, or by my last will in writing, or codicil thereto, to be by me signed in the presence of two or more credible witnesses, to revoke or alter all or any of the uses, estates and trusts thereinbefore limited or declared, of or in all or any of the premises, and to limit any new or other estates, uses, trusts or dispositions of or concerning the same, so revoked, or any part thereof: and whereas I have made and published a will in writing, bearing date the same 14th day of October, now I the said M. B., of N. and W., in pursuance and by virtue of the said power to me reserved and given, in and by the said last-recited indenture of the 14th of October, in the year —, and all and every other power and powers, authority and authorities to me given or reserved, or me in anywise enabling in this behalf, do by this my codicil revoke, annul and make void all and every the uses, trusts, estates, limitations and appointments in and by the said several recited indentures, or any of them, limited, created, or declared, of and concerning all that the said manor or reputed manor of L., with the rights, members, and appurtenances thereof, in the said county of B., and all the said messuages, lands, tenements and hereditaments of the said M. B., of N. and W., in L. and F. afore-said, or either of them, in the said county of B., in and by the said first-recited indenture of release, granted, released, or conveyed, with their and every of their appurtenances;

**No. 35.** and I the said M. B. of N. and W., in pursuance of and by virtue of all and every the power, &c. aforesaid, do direct, limit, appoint and declare, that the said first-recited indenture of release, and the grant and conveyance thereby made as to all that the said manor or reputed manor of L., with the rights, members and appurtenances thereof, in the said county of B., and all the said messuages, lands, tenements, and hereditaments of me the said M. B. of N. and W., in L. and F. aforesaid, or either of them, in the said county of B., in and by the said first-recited indenture of release granted, released, or conveyed, with their and every of their appurtenances, be and enure, and I do hereby give and devise the same in manner following, that is to say, To the use of the Honourable H. B. Esq., commonly called Lord H. B., brother of His Grace the Duke of —, for the term of his natural life, without impeachment of, or for any manner of waste; and from and after the determination of that estate by forfeiture, or otherwise in his lifetime, then to the use of the said T. B., I. L. and E. R., and their heirs, during the natural life of the said H. B., in trust, to preserve the contingent remainders hereinafter limited from being defeated and destroyed, and for that purpose to make entries or bring actions, as the case shall require; but, nevertheless, to permit and suffer the said H. B., during his natural life, to receive and take the rents and profits of the same premises to his own use; and from and after the decease of the said H. B., to the use of M. the wife of the said H. B., for the term of her natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise, during her life, to the use of the said T. B., I. L. and E. R., and their heirs, during the natural life of the said M., in trust to preserve the contingent remainders hereinafter limited, from being defeated and destroyed, and for that purpose to make entries or bring actions, as the case shall require; but nevertheless to permit and suffer the said M. during her life, to receive and take the rents, issues and profits of the said premises, to her own use: and from and after the decease of the said M., to the use of the first son of the body of the said M., by the said H. B., begotten or

to be begotten, and the heirs male of the body of such first son, lawfully issuing ; and for default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every the other son and sons of the body of the said M., by the said H. B. begotten or to be begotten, severally and successively, one after another, as they shall be in seniority of age and priority of birth, and the heirs male of their respective bodies lawfully issuing ; the elder of such sons and the heirs male of his body, being always preferred, and to take before the younger of such sons, and the heirs male of his and their body and bodies ; and for default of such issue male, to the use of all and every the daughter or daughters of the body of the said M., by the said H. B. begotten or to be begotten, as tenants in common, and not as joint tenants, and the heirs of their several and respective bodies lawfully issuing ; and failing issue of any of the said daughters, to the use of all and every other such daughter or daughters as tenants in common, and not as joint-tenants, and the heirs of the respective body or bodies of such other daughter or daughters lawfully issuing ; and for default of such issue, to the use of such person or persons, and for such estate or estates, and in such proportions and in such manner as she the said M., whether covert or sole, shall, by any deed or writing, to be by her sealed and delivered in the presence of three or more credible witnesses, or by her last will in writing, or any writing purporting to be her last will, and to be by her signed and published in the presence of a like number of witnesses, limit and appoint ; and in default of such appointment, then to the use of my own right heirs for ever : provided always, and my will and meaning is, that it shall and may be lawful to and for the said H. B., and after his decease to and for the said M. his wife, in case she shall survive him, by indenture to make any lease or leases of the premises, for any term or number of years, not exceeding twenty-one years from the making thereof, so as upon every such lease or leases there be reserved and made payable, during the continuance of the said respective terms thereby granted, the greatest improved yearly rent that can or may be reasonably had for the same, to be incident to and go



**No. 35.**  along with the remainder or reversion expectant on such leases respectively, and so as such leases be not by any express words therein contained, freed from impeachment of waste; and so also as there be contained in every such lease or leases a power of re-entry, in case the rent or rents thereupon to be respectively reserved, or any part thereof, shall be behind or unpaid by the space of twenty-one days next after any of the times of payment therein to be respectively limited; and so as the respective lessee or lessees therein named, do execute a counterpart of such lease or leases respectively; and I do hereby ratify and confirm all and every the uses, trusts, estates, limitations and appointments in and by the said recited indenture of the 14th of October, —, limited, appointed or declared, of or concerning all and every or any of the manors, messuages, lands, tenements and hereditaments therein comprised, except and other than the said manor of L., with its appurtenances, and the lands, tenements, and hereditaments aforesaid, in L. and F. aforesaid, or either of them, in the county of B., and I do also hereby declare, that my said will in writing, bearing date the 14th day of October, —, and this codicil, which I will shall be added to and deemed part thereof, do contain my last will and testament. In witness whereof I have to this codicil, and to a duplicate thereof, both of the same tenor and effect, each contained in two skins of parchment, set my hand and seal, this — day of, &c.

## No. 36.

*A nuncupative Will committed to writing.*

T. B., his will by word of mouth, made and declared by him on the ——— day of ———, in the presence of us, who have hereunto subscribed our names as witnesses hereto. My will is that, &c.

(The very words)

I. G.

R. S.

F. G.

## No. 37.

*Conclusion and Attestation of a Will, written on several sheets.*

I DO hereby make, ordain, constitute and appoint A. B. and C. D., executors of this my last will and testament, hereby revoking all former wills by me at any time heretofore made, and do declare this to be my last will and testament. In witness whereof I, the said T. S., have to this my last will and testament, contained in this and the four preceding sheets (or skins of parchment), set my hand and seal, (to wit) my hand to the bottom of each of the said four sheets (or skins,) and my hand and seal to this last sheet (or skin,) and my seal at the top of the said sheets (or skins) where all the said sheets or skins are fixed together, this — day of —, 1755.

The writing contained in this and the four preceding sheets (or skins) was signed

No. 37.



and sealed by the above-named T. S.,  
and by him published and declared as  
and for his last will and testament in  
the presence of us, who have hereunto  
subscribed our names in his presence,  
and in the presence of each other,

N. S.

T. B.

F. L.



No. 38.

*Common Form of Attestation.*

SIGNED, sealed, published and declared by the  
above-named J. S., as and for his last will and  
testament, in the presence of us, who have  
hereunto subscribed our names as witnesses  
thereto, in the presence of the said testator,  
and in the presence of each other.

C. D.

E. F.

G. H.



No. 39.

*Attestation of a Codicil.*

SIGNED, sealed, and published by the said  
M. B., of N., as and for a codicil to be added  
to and be considered as part of her last will  
and testament, in the presence of us, who have  
subscribed our names in her presence.

R. S.

F. B.

R. T.

### III. SUPPLEMENTARY MATTERS AND CASES

IN ELUCIDATION OF

SOME OF THE SUBJECTS TREATED OF

IN THESE VOLUMES.

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THELLUSSON *v.* WOODFORD.

WOODFORD *v.* THELLUSSON.

13 Vezey Jun. 209.

*Election in Equity.*

Vol. I. Chap. I. Sect. 10. The subject of election is considered in the part of this treatise here referred to, only in reference to the question, whether an unexecuted will is of force to raise a case of election against a person claiming in contradiction to the will, but taking a benefit in the personal estate under the same will. The case of *Thellusson v. Woodford* involves so clear an exposition of the general doctrine, that I have been induced to give it a place here.

“The will of Peter Thellusson, dated April 2, 1796, devising all his estates, manors, &c. at Brodsworth, and other places in the county of York, and all the messuages or tenements, Will, directing, that, in case the testator

shall enter into contracts for the purchase of lands, and die before the conveyance, such contracts shall be carried into execution, and the money paid out of his personal estate, and the conveyance be to his trustees, their heirs, &c. to the uses of his will. The heir at law, having interests bequeathed to him, put to election.

lands, hereditaments or premises, for the purchase whereof he had entered into any contract, or contracts in writing, with the benefit of such contract and contracts respectively, and all other his real estates, whatsoever and wheresoever, to the use of trustees, their heirs and assigns, upon the trusts after-mentioned, contained in the following clause :

“ ‘ In case I shall in my life-time enter into any contracts for the purchase of any lands, tenements or hereditaments, and I shall happen to die before the necessary conveyances thereof are executed, I order and direct, that all and every such contract or contracts, so entered into by me as aforesaid, shall be completed and carried into execution by my said trustees after my death, and that the purchase-moneys for such respective estates and premises shall be paid by them, by, with, and out of my personal estate and effects, and that the deeds and conveyances thereto respectively shall be made to them, their heirs and assigns ; and that they and every of them shall stand, remain, and be seised and possessed of all and singular the premises so to be conveyed upon, under, and subject to such and the same uses, trusts, limitations, provisos and conditions, as are in and by this my will created, expressed and declared, of and concerning the estates hereby directed to be purchased by and with the aforesaid residuum of my estate and effects in the manner hereinbefore mentioned.’ ”

“ ‘ The testator within a month before his death, had contracted for the purchase of real estates to the amount of 30,000*l*.

“ ‘ The bill filed by the trustees, prayed, that the trusts of the will may be established ; and that it may be declared, whether Peter Isaac Thellusson, as heir at law of the testator, is or is not entitled to such parts or particulars of his real estate, as were conveyed to him after making his will ; and also to such particulars of his real estates as were purchased, contracted, or agreed to be purchased by the testator, after making his will ; and to have such of the said contracts as remained unperformed at his decease, completed for the benefit of his said heir at law, and to have the purchase-money paid out of the personal estate of the testator ; and particularly, that it may be declared, whether the heir is en-

titled to such last-mentioned real estates, and also to the legacies and bequests in the will: and, if not, then that he may be put to his election.

“The decree, dismissing the bill filed by the widow and children of the testator, as far as it ought to have the trusts of the will declared void, and establishing the will, giving directions for carrying the trusts into execution, and declaring a trust, as to the estates, contracted for by the testator, after the date of his will, for the heir, reserving the question, whether he would be entitled to the personal bequests, having been affirmed by the house of Lords upon appeal, the question of election was brought forward upon the petition of the trustees.

THE LORD CHANCELLOR,

“The prayer of the bill, filed by the heir at law, with reference to this point, is in effect, that the personal estate of the testator shall be applied to the completion of these contracts, directed by the will to be carried into execution, for the benefit of the heir; and that he, in opposition to the will, may take as heir those estates so contracted for; and the trustees may stand seised to his use, instead of the uses of the will. I give the judgment, which I find myself bound to give, with some reluctance; considering this will as dictated by feelings, not altogether consistent with convenience. But this appears to me to be a case of election. The jurisdiction exercised by this court, compelling election, may be thus described. A person shall not claim an interest under an instrument without giving full effect to that instrument, as far as he can. If therefore a testator, intending to dispose of his property, and making all his arrangements under the impression, that he has the power to dispose of all, that is the subject of his will, mixes in his disposition property, that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will. The reason is the implied condition, that he shall not take both; and the conse-

A person shall not claim an interest under an instrument without giving full effect to it, as far as he can; renouncing any right or property, which would defeat the disposition.

quence follows, that there must be an election ; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator.

“ This is the proposition. But it has been said, that when a testator by his will attempts to give that, which is not his property, but which he supposes to be his, forming his different dispositions upon that mistake, non constat, what he would have done, had he been aware of the true state of the circumstances. The best answer to that was given by Lord Alvanley, in the case of *Whistler v. Webster* ; that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to every thing contained in it, whereby any disposition is made, shewing an intention that such a thing shall take place ; without reference to the circumstance, whether the testator had any knowledge of the extent of his power or not ; nothing can be more dangerous than to speculate upon what he would have, if he had known one thing or another : it is enough to say, he had such intention ; and the court will not speculate upon what he would have done in the different cases put : if the instrument is such as to indicate what the intention was, the only question is, did he intend the property to go in such a manner : not, whether he had power to do so, and would have done it, had he known, he could not without a condition impose upon another person : whether he thought he had the right, or, knowing the extent of his authority, intended by an arbitrary execution of power to exceed it, no person, taking under the will, shall disappoint it.

“ In every case of election there must be an intention to dispose of that, over which that person has no power of disposition. That is the circumstance that creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate ; and therefore conceived, that under this direction of his will as to his future contracts for purchases, his trustees

would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will: but the testator not being aware of that, gives considerable interests to his heir; but gives those interests under the conception that the whole property and arrangement were subject to his controul; and upon that ground the principle of election must prevail.

“ In *Noys v. Mordaunt*<sup>b</sup>, the testator imagined he had power over the estate; which was in settlement; and the Lord Keeper put the decision upon the implied condition. That case was followed by *Streatfield v. Streatfield*<sup>c</sup>, and several cases, down to *Sheddon v. Goodrich*<sup>d</sup>. The difficulty upon a plain, simple principle first occurred in the case of *Hearle v. Greenbank*<sup>e</sup>: but I do not apprehend that this case will be embarrassed by that decision. Lord Hardwicke held that the act of the infant had no effect; that there was no disposition as to the real estate; and therefore a case of election did not arise.

“ This is the case of a man having a clear right to dispose by will both of his real and personal estate: but his disposition fails as to these real estates by his ignorance of the distinction that a will of a subsequent date was necessary. There is, therefore, as in the case of *Hearle v. Greenbank*<sup>e</sup>, no will that can touch these real estates. As to the case of a devise, with two witnesses only, the intention is as plain as in *Noys v. Mordaunt*<sup>b</sup>: why then should not the court say in the former case, the intention is clear; but cannot as to the real estate have legal effect, from the omission of a third witness by mistake; as in the other case the deviser attempts through mistake, to devise an estate which is in settlement, or belongs to another person. The opinion of Lord Hardwicke I take to be this. A devise of real estate is considered as a matter of so much solemnity and importance, that the law will not accept proof of the act, without the evidence of three witnesses. If not so proved,

The only instances of limiting the principle of election, are 1st, an attempt to devise by a will not duly executed; 2dly, an attempt to devise by an infant.

<sup>b</sup> 2 Vern. 581.

<sup>d</sup> 8 Vez. Jun. 481.

<sup>e</sup> 1 Vez. 298. 3 Atk. 695.

<sup>c</sup> For. 176.

<sup>e</sup> 1 Vez. 298. 1 Atk. 695.

<sup>d</sup> 2 Vern. 581.



it is nothing: it cannot receive notice. The intention cannot be represented; for it cannot be presumed, and there is no evidence; the will not being executed with the solemnity prescribed by the law as to real estate cannot be read: the court cannot see any devise of real estate: and therefore, as the estate does not appear to be devised away from the heir, no act appearing to be done, as in this case the act does appear to be done by Mr. Thellusson, the heir cannot in that case be put to election.

"The case of *Hearle v. Greenbank*<sup>b</sup> stands upon the same ground: an infant under the statute<sup>c</sup> not having a right to dispose of real estate. The court cannot look at the will. It is, from the incapacity of the person who frames it, considered as no instrument.

"These are the only instances in which the principle has been limited. It cannot be argued that it does not reach an heir at law. Lord Hardwicke would not put the case of an heir at law by way of illustration, if the heir could not, under any circumstances, be put to election (1). The principle of election is plain and intelligible; that, if a person being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be

<sup>b</sup> 1 Vez. 298. 3 Atk. 695.

<sup>c</sup> Stat. 32 Hen. 8. c. 1. 34 Hen. 8. c. 5.

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(1) "The case of a devise to the heir of an estate, which he would have by descent, if no will was made, and to another person, of an estate, of which the heir is seised in his own right, is put by Sir Samuel Romilly, (ante, Vol. IX. 374. *Rich v. Cockell*), as said to be a case of election. Mr. Sugden (*Law of Vendors and Purchasers of Estates*, edit. 2. 128, 9. note 3.) has found a precise decision of the point accordingly, against the heir: *Anon. Gilb. Eq. Rep.* 15. In that instance it may be observed, the heir took, not under the devise, but by his better title, descent. The deviser, however, devising the estate to him, must be conceived to be aware of his power to devise it away; and the condition was accordingly implied." Note by the Reporter.

taken upon the terms of giving effect to the whole disposition. Mr. Thellusson's heir takes these estates, as if his father had not made a will : but my opinion is, that he cannot also take what is given to him by the will. He must therefore elect."

While we are upon this subject the Reader may be reminded; that the mere recital of an erroneous conception of right, is no devise by implication, so as to raise a case of election, as against the person having the right, and also taking a benefit by the will ; but it seems the testator must, by positive attempt to dispose, make his intention clear.

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SLATTER *v.* NORTON.

16 Vezey Jun. 197.

*What Words are necessary to pass Leases renewed after the making of a Will.*

Vol. I. p. 211. THE Reader will find that in the above-mentioned case, the present Master of the Rolls, Sir William Grant, holds with Sir John Strange in *Rudstone v. Anderson*, that the words; "all my lease, &c." and "all my estate or interest in my lease, &c." are only commensurate phrases, and that the future words adverted to by Lord Hardwicke, in *Abney v. Milner*, as "all my interest to come, &c." are necessary to pass the interest acquired by the renewal of a lease after a will made.

\* *Dashwood v. Peyton*, 18 Vez. Jun. 27.

## SHEATH v. YORK.

1 Vezey and Beames, 390.

*Revocation by Marriage and the birth of Children.*

Vol. I. p. 347. IN the above case a restriction was adopted, in regard to devises of real estate, as to the question of revocation by a second marriage, and the birth of a child or children, where, at the death of the testator, children by the first marriage are in existence, which introduces a new and important feature into the doctrine treated of in the 17th section of the 1st chapter of Vol. I. of this treatise. The case is as follows:

Testator, a widower, having a son and two daughters, by will gave all his real and personal estates in trust, subject to debts, for those children, and in case of their deaths over. Marriage and the birth of a daughter, held a revocation of the will in the Ecclesiastical Court, (against a former decision) not a revocation of the devise of the real estate.

“ Henry Clarke by his will gave to trustees all his real and personal estate upon trust to sell; and after payment of all his debts, &c. to place out the residue of the monies, arising from such sale on government or other security, and pay the interest, &c. towards the maintenance and education of his son John, and daughters Mary and Elizabeth, until they should attain twenty-one, and then to pay the principal equally unto and amongst his said children: but in case all his said children should die under age and without leaving issue, then upon trust to pay the residue unto his cousins, Peregrine Clarke, Henry Clarke, and Mary, the wife of Joseph Fowdrell: and he appointed his trustees executors and guardians of his children.

“ At the time of making his will the testator was a widower, having the three children only, named in his will. He afterwards married a second wife, by whom he had issue one daughter. He died in November, 1810; and his son John Clarke died an infant, in September, 1811.

“ A suit having been instituted in the Prerogative Court of Canterbury, that Court decreed, that the will was revoked by the subsequent marriage and birth of the child. A bill was then filed by some of the simple-contract creditors of the testator, against the executors and trustees of the testa-

tor, his two daughters by the first marriage, and those in remainder, &c. praying an account, payment, and sale.

**THE MASTER OF THE ROLLS.**

“LONG after it had been settled by decisions of the Ecclesiastical Court, with the concurrence of Common Law Judges, sitting in the Court of Delegates, that marriage and the birth of a child would amount to a revocation of a will of personal property, it remained a doubt, whether such an alteration of circumstances would have the same effect with regard to a will of real estate : but it is now settled, that even a devise of land may be revoked by what Lord Kenyon, in the case of *Doe on the demise of Lancashire v. Lancashire*\*, calls ‘a total change in the situation of testator’s family.’ What shall be deemed such a total change, may be matter of controversy in each new case : but all the cases, in which, hitherto, wills of land have been set aside upon this doctrine, have been very simple in their circumstances; and such as, when the doctrine was once received, could admit of no doubt with respect to its application. In all of them the will has been that of a person, who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir, to take an estate, disposed of by a will, made before his birth. The condition, implied in those cases, was, that the testator, when he made his will in favour of a stranger, or more remote relation, intended, that it should not operate, if he should have an heir of his own body.

Marriage and birth of a child an implied revocation of a will of personal property. Even a devise of land may be revoked by implication from a total change in the situation of the family, as, where the devisor has no children at the date of the will, by his marriage and the birth of an heir; upon an implied condition, that the will should not operate in that event.

“ In this case there is no room for the operation of such a condition ; as this testator had children at the date of the will ; of whom one was his heir apparent ; who was alive at the time of the second marriage, of the birth of the children by that marriage, and of the testator’s death. Upon no rational principle, therefore, can this testator be supposed to have intended to revoke his will on account of the birth of other children ; those children not deriving any benefit whatsoever from the revocation ; which would have operated

only to let in the eldest son to the whole of that estate which he had by the will divided between that eldest son and the other children of the first marriage.

“It is true, the Ecclesiastical Court has decided, that the will was revoked as to the personal estate : that is, in opposition to their decision in *Thompson v. Sheppard*, in 1779 ; where, under circumstances precisely the same, the will was held not revoked even as to the personal estate. There was in that case an appeal to the Delegates, but it was not prosecuted. The revocation however, as to the personal estate, had an effect, which might, perhaps, have been intended by the testator : that of letting in the after-born children with those of the first marriage : but the principle of the decision has no bearing whatsoever upon the devise of the real estate ; which, according to my opinion, stands unrevoked.”



DOE, ex. dem. CALKIN, v. TOMKINSON AND  
OTHERS.

2 Maule and Selwyn, 165.

*What contingent Estates are devisable, and of the effect of the word ‘survivor,’ added to words creating a tenancy in common.*

Devise of all his real and personal estate wheresoever and whatsoever, equally to his sisters M. and E., or

“EJECTMENT brought on the joint demise of S. Calkin and Jane his wife, J. McCormac and Anne his wife, and J. Cartlich and Sarah his wife, for a messuage and land in the parish of Dilhorn, in the county of Stafford. Plea, not guilty. At the trial at the Stafford Lent assizes, 1813, a verdict was found for the plaintiff, subject to the opinion of the court, on the following case :

"On the 7th of September, 1802, John Tomkinson being seised in fee of the premises in question, by his will, after directing his debts and funeral expences to be paid, devised thus : ' My will and desire is, that all my real and personal estate wheresoever and whatsoever, be left equally to my sisters, Mary and Elizabeth Tomkinson, of Forsbrooke, or to the survivor of them, and to be disposed of by the survivor, as she may by will devise,' and made his said sisters his executrixes. The testator died in 1810, leaving the said Mary and Elizabeth (who thereupon took possession of the estate) and also another sister, Anne, him surviving. Afterwards, on the 9th of July, 1810, Mary made her will, and thereby devised all her messuages, lands, tenements, hereditaments, and real estates whatsoever, situate at Forsbrooke, or elsewhere in the county of Stafford, to her sisters Elizabeth and Anne, successively for life, and from and after the decease of the survivor of them, she devised all such part of her real estate which was devised to her by the will of her late brother J. Tomkinson, to the defendants, their heirs and assigns, as tenants in common, and not as joint tenants. Elizabeth Tomkinson was living at the time when Mary made this will. Mary survived both E. and A. Tomkinson, but died without having re-published her will. The lessors of the plaintiff, Jane, Anne, and Sarah, are the heirs at law of Mary, and also of John, Elizabeth, and Anne Tomkinson.

to the survivor of them, and to be disposed of by the survivor as she may by will devise: held that the sisters did not take as tenants in common in fee; nor, supposing them to be tenants in common for life with a contingent remainder in fee to the survivor, or with a power to the survivor to dispose of the fee by will, was it such a contingent remainder as was devisable by a will made by one in the lifetime of both the sisters, nor was the power well executed by such will.

"The question for the opinion of the court is, whether the plaintiff is entitled to recover; if the court shall be of opinion that he is entitled, the verdict is to stand; if not, a nonsuit is to be entered.

"Lord ELLENBOROUGH C. J. It may be somewhat difficult, upon a will framed like this, to say what the estate given by it is; but, it is not equally so, to say what it is not. If it be not a tenancy in common in fee, it is clear that the defendants are not entitled to any part, under the will of M. Tomkinson. Now, to put this construction on the will of J. Tomkinson, would defeat the intention of the testator, because his intention was to give the whole to the

survivor. But then it is said, that this is a contingent remainder to the survivor, and such as is devisable; but supposing it to be a contingent remainder, I think it cannot be considered as devisable, because the person who is to take, is not in any degree ascertainable before the contingency happens; it cannot be said in whom the interest is, during the lives of the two sisters, nor consequently that it is in either of them during that period; and it is only in the event of survivorship that it becomes certain. Admitting therefore, the enlarged construction put on the statute of wills by Lord Kenyon and the other Judges in *Roe v. Jones*, how can a person be said to have a contingent interest, when it is uncertain whether he is the person who will be entitled to have it or not. And as to the case cited from *Viner*, to shew, that if this be a power to the survivor, it has been well executed, the distinction between that case and the present is, that there the power was given to a designated person to be executed upon a contingency; here it is given to a contingent person. Therefore, without determining what the precise estate given is, it appears to me sufficient to say that the defendants are not entitled.

“**LE BLANC J.** The defendants must support their case by shewing that this was a tenancy in common in fee, or such a contingent interest as was devisable by *M. Tomkinson*. On reading the words of the will, I think it is impossible to say that it is the first, without rejecting material words. The words are, ‘that all my real and personal estate be left equally to my sisters, Mary and Elizabeth, or to the survivor, and to be disposed of by the survivor as she may by will devise.’ In order to construe this to be a tenancy in common, it would be necessary to strike out the words, ‘to the survivor, and to be disposed of by the survivor,’ which are inconsistent with a tenancy in common, and thus to take away from the survivor the power of disposing of it. But as it is impossible to reject such material words, so we cannot intend that the deviser meant to give a tenancy in common in fee. Upon a will framed like this, I should perhaps feel great difficulties in determining what

precise estate was given, but I think it is quite clear, that we cannot put that construction on it which would reject material words.

“DAMPIER J. In *Selwyn v. Selwyn*, the person who was to take was apparent; there was, therefore, *persona designata*; and so it is evident Lord Mansfield considered, from what he said of that case in *Roe v. Griffiths*. I am not aware of any decision which reaches a case where the person is uncertain.

Per Curiam,

Judgment for the Plaintiff.”

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WILKINSON *v.* ADAM.

1 Vezey and Beames, 422.

*Natural Children—under what words entitled.*

The opinions of the judges, and the judgment of the Lord Chancellor will inform the Reader sufficiently of the circumstances, and points of the case.

“The following written opinion was sent by Baron Thompson, and the Justices Le Blanc and Gibbs, to the Lord Chancellor.

“The question to which our present opinion will be confined, is, whether the three natural children of John Wilkinson, by Ann Lewis, born before the making of his will of November 29th, 1806, are entitled to take his real estate by force of that will alone.

“The facts, out of which this question arises, are these : Mr. Wilkinson being seised of a very considerable real estate, and possessed of personal property to a very large amount, on the 29th November 1806, made his will, duly executed and attested for passing real estates. At this time he had a wife, Mary Wilkinson, still living, but no children



by her. A woman of the name of Ann Lewis was living with him, by whom he had three natural children : Mary Ann, born July 7th, 1802 ; Jonina, born August 6th, 1805 ; and John, born October 8th, 1806. All these children, at the time when the testator made his will, had acquired the character and reputation of being his natural children by Ann Lewis. The testator's wife, Mary Wilkinson, died in December 1806. Subsequent to her death, the testator re-published his will, in the presence of three witnesses. On the 14th of July 1808, the testator died, leaving the said Ann Lewis, and his said three natural children by her, surviving him.

“ From the material parts of this will, as they bear upon the present question, we think it most certainly appears that the testator meant the above-mentioned devise to operate in favour of his illegitimate children, born, and to be born, by Ann Lewis, and that he had illegitimate children only in his contemplation.

“ The manner in which he describes the children themselves, and Ann Lewis, their mother, as living with him, whilst his wife was then alive, the mode in which he appoints her guardian of such children, the limiting her annuity, and the compensation for the guardianship, to the time of her continuing single and unmarried, together with many other passages in the will, appear to us to place this intention beyond all possible doubt.

“ It has been said that the testator might, when he made his will, have looked to the possibility of his wife's dying before him, of his marrying Ann Lewis, and of his having children by her ; and that such children may have been the objects of his intended bounty, under the above bequest : but it is impossible for any man, looking through the whole of this will, to suppose that he entertained any such intention ; or that he had any such objects in view ; and it is observable, that he has evidently contemplated a state of things, in which the event of his marriage with Ann Lewis would have been impossible ; and yet his children by her are still to take, for he has bequeathed his mansion-house at Castle-Head, and certain other parts of his property, to his wife for her life, and after her decease to Ann Lewis, for her life, and after

the decease of both, to his children, by Ann Lewis. Now, supposing these several bequests to take place in the order in which they stand, the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate. We think therefore, that his illegitimate children, born, and to be born of Ann Lewis, were the intended, and probably the sole intended objects of his bounty. We also think, that if he had any illegitimate children by her, after his will was made, such future children could not have taken for the reason which is to be found in all the authorities upon this subject; that an illegitimate child can only take by his reputed name of child; and that, until he is born, he cannot acquire that name by reputation.

“ But with respect to the three children, who were born before the making of the will, the depositions prove most abundantly, that they had then acquired the reputation of being the children of the testator, by Ann Lewis; and thinking for the reasons above given, that they were the intended objects of the testator’s bounty, we think that they are intended to take the real estate under the will itself, without the aid or explanation of any other papers.

“ It has been argued, though not much pressed, that this devise applies only to future illegitimate children; and is therefore void: but, looking to the different parts of the will, we think it clearly appears (if that were necessary,) that the testator had in his actual contemplation the illegitimate children, who were then born, as well as those whom he might afterwards have by Ann Lewis. It was also urged, that as the testator re-published his will after the death of his wife, and when the event of his marrying Ann Lewis was thereby brought within his own power, it is fairly to be presumed, that, under the description of his children by Ann Lewis, he meant such children as he might have by her, if he should afterwards marry her; but we think, that in the construction of this devise, the intention of the testator is to be collected from the state of things at the time when he made his will, not when he re-published it; and we also think, that if the alteration which took place in the interval between the making and re-publishing his will, were taken into the account, enough would still remain to shew that his

illegitimate children by Ann Lewis, were the objects whom he had in view.

“ It was also contended, and this appears to have been the main stress of the argument, that, admitting the intention of the testator to be clear in favour of his illegitimate children by Ann Lewis, that illegitimate children, born before the will, are included, and that the claimants had acquired the name and reputation of being the children of the testator by Ann Lewis; still by the settled and established rules of law they cannot take under the general description of children in this bequest; and a passage in Coke, Litt. 3, b. was cited, and much commented upon, as supporting this doctrine. It is there said that ‘ a bastard having gotten a name by reputation, may purchase, by his reputed or known name, to him and his heirs; although he can have no heir but of his body. A man makes a lease to B. for life, remainder to the eldest issue male of B. and the heirs males of his body. B. hath issue a bastard son. He shall not take the remainder, because in law he is not his issue; for *qui ex damnato coitu nascuntur inter liberos non computentur*; and, as Littleton saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soon as he is born. So it is, if a man make a lease for life to B. the remainder to the eldest issue male of B., to be begotten on the body of Jane S., whether the same issue be legitimate or illegitimate. B. hath issue a bastard on the body of Jane S. This son or issue shall not take the remainder; for (as it hath been said,) by the name of issue, if there had been no other words he could not take; and (as it hath been also said,) a bastard cannot take but after he hath gained a name by reputation, that he is the son of B., &c.; and therefore he can take no remainder limited before he be born: but after he be born, and that he hath gained by time a reputation to be known by the name of a son, then a remainder limited to him by the name of the son of his reputed father is good. But if he cannot take the remainder by the name of issue, at the time when he is born, he shall never take it.’

An illegitimate child cannot take by the

“ We collect from this passage, that an illegitimate child cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child:

but that after he has acquired the reputation of being such child, he may take by that description. So Lord Macclesfield appears to have understood it in the case of *Metham v. The Duke of Devon*\*, hereafter referred to; and the Master of the Rolls, in the case of *Earle v. Wilson*†, recognises this as the doctrine adopted and acted upon by Lord Macclesfield, in the above-mentioned case of *Metham v. The Duke of Devon*.

description of child of his reputed father, until he has acquired the reputation of being such child.

“ It was admitted in argument by one of the counsel who opposed the claim of the children, that, taking the intention to be clear in favour of illegitimate children, if the devise had been to the testator’s three children by Ann Lewis, it would have been a sufficient designation of them; but he insisted that illegitimate children could never take under the general description of children as a class; and he pointed out several inconveniences, which he supposed would arise out of an enquiry into the fact, whether the several claimants were or were not the children of the testator.

“ But it appears to us that the enquiry must be the same in substance, whether the bequest were to the testator’s three illegitimate children by Ann Lewis, or to his illegitimate children generally by her; that in the latter, as well as the former case, the inquiry would not be into the fact, but into the reputation of their being such; and that the inconveniences pointed out could never arise, because it is not the fact of the relationship, but the reputation of it, which is to be enquired into in both cases.

“ In the former case we should have to enquire, whether each of the persons who presented himself as one of the three children designated by the will, had, or had not, at the time of the will acquired the reputation of being such child: in the latter the nature of the enquiry would be precisely the same; though it might be directed to a different number of objects.

“ The case of *Godfrey v. Davis*\*, was cited as an authority against the claim of the illegitimate children in the present case. That was a bequest in remainder to the eldest child,

\* 1 P. Will. 529.

† 17 Vez. 528.

\* 6 Vez. 43.

male or female, of William Harwood ; and the Master of the Rolls held that an illegitimate child of William Harwood could not take ; although it was known to the testator at the time of making his will, that William Harwood had only illegitimate children : but there William Harwood was a single man, the event of his marrying, and having legitimate children might fairly be looked to : and there was nothing apparent upon the face of the will, or to be collected from the state of William Harwood's family, which shewed that the testator meant by the word 'child' to describe an illegitimate child. In the present case we think, the will itself points clearly and manifestly at illegitimate children.

" It has also been urged against this construction of the devise in favour of the illegitimate children, that, whatever the intention of the testator might be, it was at least a possible event that the testator might survive his wife, and marry Ann Lewis, and have children by her ; in which event those legitimate children would answer the description of the testator's children by Ann Lewis, and must necessarily take under the will ; and that it is an established and inflexible rule of law, that legitimate and illegitimate children cannot take together under the general description of children. We will take the former part of this proposition to be true ; and we think it is so. It was possible that the testator might outlive his wife, and marry Ann Lewis, and have legitimate children by her : the words of the devise are large enough to include such children, and there appears no express intention to exclude them, though probably the testator had them not in contemplation. We incline to think therefore, that such children would take under the devise ; but the conclusion drawn from thence, that under the circumstances of this case the illegitimate children cannot take with them, is not, as we think, well founded. We think that the illegitimate children take, because they were clearly meant, and that if legitimate children of the description above-mentioned would also take, it is because the words are large enough to reach them ; and the testator expressed no intention to exclude them, though he did not contemplate their existence. When born, they would answer the description

of his children by Ann Lewis, and being born in marriage, though after the will, the devise would as to them be free from all legal objection.

“ It is said that this doctrine is opposed by the authority of several decisions, and the cases of *Cartwright v. Vawdry*\*, and *Kenebel v. Scrafton*\*, are cited, and relied on for this purpose. In the case of *Cartwright v. Vawdry*, the testator gives his real and personal estates to his executors, in trust to apply a reasonable part of the produce in the maintenance, &c. of all and every such child or children as he might happen to have at his death, equally, share and share alike, until each of them should attain twenty-one or marriage; then to pay such of them as became of age, or married, one-fourth of the whole income. The testator had one daughter, Mary, who was always treated as, and supposed to be legitimate, but was actually born before marriage, and three younger legitimate daughters. Mary filed a bill for her share as a child; the others were desirous that she should share, but two were under age. It was contended that the division into fourths by the testator, shewed clearly that he meant to include Mary as a child; but the Chancellor (Lord Loughborough) says, ‘ it is impossible in a court of justice to hold that an illegitimate child can take equally with lawful children, upon a devise to children;’ and he proposes, that as all were desirous of giving Mary her share, the cause should stand over until the youngest daughter should attain twenty-one; which was ordered accordingly; and the case does not appear to have been again heard of in court. It cannot therefore be considered as a decision. Lord Loughborough may have thought that the intent of the testator to include his illegitimate daughter was not sufficiently manifest; and the doctrine laid down by him may be considered as applicable to these cases only, in which the word ‘ children’ is used generally without a clear intent; as we think, there appears here on the part of the testator to include illegitimate children. We do not therefore think, that it bears with any weight upon the present case.

\* 5 Vez. 530.

\* 2 East, 530.

“ In regard to *Kenebel v. Scrafton*, the testator, James Bradshaw, having devised all his real and personal estate to a trustee, declared the uses thereof in the following words : ‘ I give all my personal estate whatsoever and wheresoever, &c. to my dearly beloved Mary Ann Simpson, one of the daughters of J. Simpson, &c. for her sole use and benefit for ever ; and I will that out of the rents, &c. of my said estates, my said trustee shall pay unto the said M. A. Simpson, an annuity of 150*l.* for her life ; and in case I shall have any child or children by her who shall be living at my decease then I order,’ &c. ; and he proceeds to make a provision for such children. The will bore date the 28th of January 1795, and the testator had one male child by Mary Ann Simpson then living. This child died on the 9th of June 1795, and on the 29th of August in the same year the testator intermarried with the said Mary Ann Simpson, and had three children by her, two of whom were the defendants in the cause, the other having died. The question was, whether the marriage of the testator, and the birth of these children after the date of the will, operated as an implied revocation of it ; and the Court of King’s Bench were of the opinion that they did not so operate, holding that those children might take under the will.

“ Perhaps it might have been well decided upon the facts of that case, that it did not sufficiently appear that the testator intended to include illegitimate children in the devise ; inasmuch as both he and Mary Ann Simpson were single at the time when he made his will, and there was no impediment to their marrying, and having legitimate children, who might be the intended objects of his bounty. From the language of the judgment however, it certainly seems that the court thought that the testator meant to provide for children of a different character and denomination from legitimate ; and yet they determine that legitimate children may take under the bequest. In every view of the case we think that they might, because the terms of the devise were large enough to comprehend them : but nothing is said in that judgment from which we can collect that where a devise evidently points at illegitimate children, and where legitimate children are admitted under it, because the words are large

enough to reach them, the illegitimate children cannot take together with the legitimate : nor that even in the case then before the court, if the illegitimate child had been living, he would not have been permitted to take with the legitimate children.

“ But if it is an established and inflexible rule, that legitimate and illegitimate children can in no case take together under the description of children, we should rather be disposed to say in the present case, that legitimate children could not take, notwithstanding the generality of the words, than that illegitimate children should be excluded, to the disappointment of the clear and manifest intention of the testator. It is observable that in the present case there are no legitimate children to contend with the illegitimate : but we have reasoned it on the supposition that there were both, as much of the argument was founded on the possibility of that event.

“ We have stated the grounds upon which, independent of any authority to the direct point, our opinion in favour of the children is founded, and the manner in which it appears to us that the arguments and authorities urged against the claim of these children, may be answered ; but there is one authority directly to the point, that illegitimate children, born, and reputed as such, before the will, may take as a class under the general description of children. We allude to the case of *Metham against the Duke of Devon*’.

“ That case arose upon a devise of 3000*l.* by the late Earl of Devon to all the natural children of his son, the late Duke of Devon, by Mrs. Heneage ; and the question was, whether the natural children of Mrs. Heneage, born after the will, should take a share of the 3000*l.* No question was made but that the children born before the will, might legally take, and the Chancellor (Lord Macclesfield,) in stating the objection to the claim of children born after the will, clearly explains the ground upon which he thought the children born before the will, might take under that bequest.

“ He says that bastards cannot take, until they have gained a name by reputation ; and again afterwards, that a bastard



could not take until he had a reputation of being such a one's child ; and that reputation could not be gained before the child was born. It is evident, therefore, that under the description of all the natural children of his son, by Mrs. Heneage, the Lord Chancellor thought that all who had acquired the reputation of being such children before the will was made, might legally take : and consequently that the enquiry must be, not who were in point of fact such children, but who had acquired the reputation of being so.

" For these reasons we think that the three children of the testator John Wilkinson, by Ann Lewis, who had acquired the reputation of being such children before the date of his will, are entitled to his real estates under the will alone, without the aid of any other papers.

" A. THOMPSON,

" S. LE BLANC,

" V. GIBBS."

" THE LORD CHANCELLOR,

" I have been favoured with the opinion of the three judges on the second point ; how far this book is to be considered as describing the individuals who are to take under the will. The judges state their opinion in the following terms :

" ' Upon this point, as it regards the real estate, we agree in thinking the testator does not refer to the book, as containing the description of the persons to take under the will ; and it cannot be resorted to as part of his will for the purpose of ascertaining them.'

" ' This is expressed in very cautious and particular terms ; from which I understand they do not go the length of saying, that no part of the book can be considered as part of the will. I believe they intended that, but it may mean, that attending to the particular manner in which the testator in that book refers to subjects, as to which he gives directions, the reference is not to that part of the book, or that it does not make it part of the will. I collect however their opinion, that it must be by force of the will itself that these natural children are to take, and that they cannot have the benefit of the contents of this book as a description of them.

“As this is a case furnishing questions, not only of considerable importance, but of difficulty, and which probably may go to the House of Lords, I should not think it right to state merely my opinion upon the two points, without the reasons; and before the conclusion of the cause I shall have an opportunity of conversing with the judges, and understanding precisely the grounds on which they proceeded.

“THE LORD CHANCELLOR,

“This is a case in which the testator being a married man at the date of his will, his wife then living, and having no legitimate children, it is proved as a fact that he had three infant children born of a woman named Ann Lewis, which three children, it appears proved, had gained the reputation of being his natural children. After the execution of his will he appears to have frequently re-published it; but it is only material to notice that he did re-publish it, after he had in a book expressly stated by a paper, not attested by three witnesses, who were the individuals he meant by the description of certain devisees in his will. He re-published the will by a codicil, duly attested, of a date subsequent to that description; and one question that was made is, whether that book is to be taken to be part of the will as to the real estate\*.

“The two concluding clauses of the will, which must be taken as speaking from the moment of the last re-publication, have reference to the book which has been produced, and it was particularly pointed out by Mr. Preston, that in one of these codicils, proved in the ecclesiastical court, the testator takes notice of the place where he wishes to be buried. Upon this question the judges have certified their opinion, that this book cannot be resorted to for the purpose of explaining who are the persons intended to take; and I take them to have expressed their opinion so, in order to avoid concluding the question, whether that book might be resorted to as evidence of the reputation, to fix the character of children upon these three devisees. I say nothing at present upon that question, as I remain of the opinion I expressed, that I find no authority to justify me in holding that

\* Vide Supra, p. 67.

this book, with reference to the devisees, can be taken as part of the will, as to the real estate. It is not necessary to examine how far all the dicta to be found, where a will, attested by three witnesses, refers to an antecedent paper, can be supported; but there was no period of this testator's life, in which it could be asserted, that if he had died at the moment, any book whatsoever would have formed part of his will. The book was ambulatory to the last moment of his existence; and it is impossible, upon the principle of the case of *Smart v. Prujean*<sup>1</sup>, to maintain that this book was part of the will as to the real estate. If it could have been so considered, it would not have been necessary to consider the other question upon the will, as those papers would have given a distinct description of the persons intended: but if they are not to be taken as part of the will, it is necessary to consider the testator's meaning, as it is to be collected agreeably to the rules of law upon the will itself.

"This is, as I have observed, the will of a man, married, his wife living at the time, having no legitimate children, but three infants sufficiently proved to be at that time his reputed children by Ann Lewis. The question is, whether those three children, who had gained the reputation of being the children of this testator, previously to the will, can take the property devised by these words, being illegitimate, or whether the construction is not to be such children as he might have by Ann Lewis legally, in case his wife should die, and he should marry Ann Lewis, and have legitimate children by her.

"Child,"  
&c. *primâ*  
*facie* means  
legitimate.

"The rule cannot be stated too broadly, that the description, 'child, son, issue,' every word of that species must be taken *primâ facie*, to mean legitimate child, son, or issue: but the true question here is, whether it appears by what we call sufficient description, or necessary implication, that the testator did mean these illegitimate children, and to view the case as accurately as is necessary for the purpose of a determination of that question, we must consider what would have been the effect, not only with reference to children, who had at the time of making the will gained the reputation and character of being his children, but also as to future illegitimate children, who, though not to be considered

as his children at the moment of their birth, might have acquired that character before his death; and we must see what would have been the effect if it had happened that, surviving his wife, he had married Ann Lewis, and had legitimate children by her. The case has been very ably argued upon the view of all these events.

“ In all the cases that I have seen, having relation to this question, the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will itself, but by the effect of evidence dehors, read, or attempted to be read, with a view to establish, not out of the contents of the will, but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case is supposed to rest upon any evidence out of the will, except that which establishes the fact, that there were individuals who had gained by reputation the name and character of his children, that conclusion is drawn without sufficient attention to the grounds on which the judgment is formed: my opinion being, that, taking the fact as established, that there were children who had gained the reputation of being his children, it does necessarily appear on the will itself, that he intended those children. If that principle is just, and this case falls within its reach, all the cases cited are inapplicable to this.

“ In the case of *Godfrey v. Davis* whatever was proved in the cause, nothing resulted from the will itself, shewing, that the testator knew those circumstances which were reasoned upon. There is no doubt that child might have been *persona designata*: but the question was, where the will furnished nothing but the general description, ‘ the child of William Harwood,’ those terms were a sufficient indication of that intention. The question then, consistently with that case, will be, what is necessary in a will, describing the devisee under the general term ‘ child,’ to enable the court to say, there is sufficient in that will, particularly to point out and manifestly and incontrovertibly to shew that the testator intended a natural child; taking the whole description together. With that decision I perfectly agree: my opinion

being, that there was not enough in that will to shew, that the natural child was the persona designata. Harwood was a single man, who might marry, and might have legitimate children; but the question in this case is as to a man married at the time of making the will, and stating incontrovertibly, that he thought his wife would survive him. What could he mean by describing these as his children; the children of a person, who, it is plain, supposed he should die before he could get rid of the connexion he had by marriage, with another woman.

The case of *Cartwright v. Vawdry*<sup>a</sup> also appears to me to be rightly decided: by the language of the will in that case the testator appears to have had in contemplation, that there might be more or fewer children at her death, than there were, when he made his will; which is very material to this case. Though, it is true, there were three legitimate children, and one illegitimate, the circumstances of the direction to apply the income in fourths can only afford a conjecture; as if, between the time of his will and his death, one or two of these children had died, the division in fourths would have been just as inapplicable as it was in the case that happened. The question, therefore, only comes to this,—whether the single circumstance of his directing the maintenance in fourths, compelled the court to hold by necessary implication that the illegitimate child was to take by implication with the others, as much as if she had been, in the clearest and plainest terms, persona designata; and my opinion is, that this circumstance is by no means sufficient. That testator, it is clear, had made a will, which, though his death followed so quick, would have operated in favour of all his children, however numerous they might have been; and in favour of subsequent legitimate children, even if every legitimate child he had before, had died. It was, therefore, impossible to say, he necessarily means the illegitimate child; as it is not possible to say, he meant those legitimate children. That will would have provided for children, living at the time of his death, though not at the date of his will. It could not be taken to describe two classes of children,

<sup>a</sup> 5 Vez. 530.

both legitimate and illegitimate. Without extrinsic evidence it was impossible, upon the will itself, to raise the question. The will itself furnished no question, whether legitimate or illegitimate children were intended: but the question upon which the court was to decide, was furnished by matter arising out of, not in, the will.

"The case of *Kenebel v. Scrafton*<sup>1</sup> had for a considerable time very great weight with me upon this question. The point immediately before the court was, whether the will of that testator, who was an unmarried man, was revoked by his marriage and the subsequent birth of children. The opinion of the court, consistently with former authorities, was, that as marriage alone will not revoke a will, though connected with the birth of a child it will, yet those two circumstances would not have that effect, the will containing a provision for children, if the testator should have any.

Marriage alone not a revocation of a will; as with the birth of a child it is. Exception, where the will provides for children.

"Upon what can be collected from what was said by the court, and from the argument, there was nothing upon the face of that will, raising a necessary implication, that legitimate children were not to take; or that legitimate and illegitimate children could not take together, as it has been argued here, under the same description. It would be very difficult to make out, that they can so take: but that was not a difficulty with which the court had to contend in that case. If the court had thought that those words meant illegitimate children, the necessary effect of the subsequent birth of children would have been, that the will would have been revoked. We may conjecture that he meant illegitimate children, if he did not marry; yet notwithstanding that may be conjectured, the opinion of the court was, as mine is, that, where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and children, he must be considered as intending legitimate children, as there is not enough upon the will itself to shew, that he meant illegitimate children; and my opinion is, that such intention must appear by necessary implication upon the will itself.

"With regard to that expression 'necessary implication,'

<sup>1</sup> 2 East, 530. Vide *Supra*, p. 347.

Necessary implication imports, not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed.

Bastard may take by purchase, if sufficiently described; and having acquired the reputation of the child of a particular person.

I will repeat what I have before stated from a note of Lord Hardwicke's judgment in *Coriton v. Hellier*; that in construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed.

"I do not notice *Earl v. Wilson*<sup>m</sup> and all the other cases, as they only go to this; that the description of son, child, &c. means *prima facie* legitimate son, &c.; and all the cases, from the passage in Lord Coke<sup>n</sup>, establishing, that a bastard may take by purchase, if sufficiently described, amount to no more than he must make that out upon the will itself.

"It was stated, with great force, that a decision in favour of these children, would introduce evidence which no court ought to endure; that the mother must be called, for the purpose of enquiring from her, whether the illegitimate children were begotten by the testator or by other persons. That is not so. All the cases which negative the possibility of a natural child taking, under the general description of 'the child of which A. is enseint by me,' &c. are authorities that this is not the species of evidence by which the court enquires who are meant; but the evidence of that is, that A. has acquired the name and character of son, or child, by reputation; and whatever disappointment it may be supposed a testator would feel, if, having had no concern with the creation of that child, he could see what was going on, yet, that child, if it had obtained the reputation of being his child, would take under that description; though if he had been aware of the real fact, he would have prevented that by an alteration of his will; but the true question is, had the child acquired a name and character that entitled the court to say,—that child is the person to take?

"It was stated, very ably, that this might have done, if the description had been by a nick-name, a bodily infirmity, the place of birth, or residence of the child; and it seems to be admitted, that if the testator had spoken of his three

<sup>m</sup> 17 Vez. 528.

<sup>n</sup> Co. Lit. 3. b.

children by Ann Lewis, that would have done ; but it is said, they cannot be described as a class. If that description would have done, the ground must be, that the evidence establishes who are to take by reputation ; not as evidence of the fact. If you are to enquire who was the father of the children, you must do so in the same manner when he does not state their number : but in that case also, if it can be proved that there are three children who had acquired the reputation of being his children, they would take ; and, if he had mentioned three children, and only two could be found who had the reputation of being his, those two only would take, though three were mentioned ; not being expressly named in his will.

“ It was strongly urged farther, that though he might give to three children, by a description amounting to a *designatio personarum*, he could not give to natural children, as a class ; supposing he had used those words instead of any equivalent expression. Upon that question, whether he could give to natural children, as a class, whatever might have been my opinion, if this were *res integra*, the case of *Metham v. the Duke of Devon*\*, which has determined that a testator may give to natural children, as a class, has never been disturbed ; and if it is to be now disturbed, this is not the place for that.

“ It is farther contended however, that, if natural children, then born, may take as a class, future natural children cannot. It is quite unnecessary now, to decide that question. Here are no after-born children ; and, with regard to the expression, ‘ which I may have,’ though obviously future, yet upon the whole, it is clear that by those words, the testator meant to describe persons then, at the date of the will, in existence. Whether the cases cited from Lord Coke†, which are all cases of deeds, have necessarily established that no future illegitimate child can take, under any description in a will, whether that is to be taken as the law, it is not necessary to decide in this case. I will leave that point where I find it, without any determination. It was farther argued, with great force, that if this testator had lived until

\* 1 P. Wms. 529.

† Co. Lit. 3 b.



the death of his wife, as he did, and had afterwards married Ann Lewis, and had legitimate children by her, those children must have taken ; and legitimate and illegitimate children cannot both take under the same description ; and it would be very difficult to persuade me that they can : but, if my opinion is right, that upon the contents of this will the testator is proved to have intended illegitimate children, that question never could have arisen ; as then, though the devise is to illegitimate children, marriage and the birth of legitimate children would have the same effect as upon a devise to any stranger.

“ The question, therefore, comes round to this ; whether upon the contents of this will it is possible to say, he could mean, at the time of making that will any but illegitimate children ; a married man, with a wife, who he thought would survive him, providing for another woman, to take after the death of his wife, and for children by that woman : it is impossible that he could mean any thing but illegitimate children ; and, if that devise would have comprehended legitimate children, that would be by an operation of law, that would have been an entire surprise upon him ; as he could not mean legitimate children by this will. If the will itself shews that, without any other evidence than what proves who were reputed to be his children, and, that being established, the will itself shews he meant to provide for them, so providing for them as necessarily to shew that they are his devisees, there is no authority that the devisees, whose character is so necessarily to be collected from the will, are not capable of taking.

“ The conclusion is, that these three children are upon the will itself, the whole taken together, without looking at the book, entitled to take, as the devisees of this testator.

“ The injunction was dissolved : and the bill dismissed.”

\* Swaine v. Kennerley, post.

**SWAINE v. KENNERLEY.**

1 Vesey and Beames, 469.

“**JAMES SWAINE**, by his will, dated the 24th of August, 1796, devised his real estates to John Kent and Samuel Kennerley, their heirs and assigns, upon trust, by mortgage or sale to raise the sum of 2100*l.* and lay out the same in their own names, in the purchase of freehold lands, &c. and settle the same to the use of all and every the child and children of the testator's late son, Thomas Swaine deceased, equally to be divided between or amongst them, to hold as tenants in common and not as joint tenants, and to the respective heirs of the body or bodies of all and every such child and children issuing.

“The testator's son, Thomas Swaine, left three children, of whom the plaintiff only was legitimate; the other two, Thomas and John Swaine, being born before marriage. The bill prayed a declaration, that the plaintiff was entitled as tenant in tail in equity, to the whole 2100*l.*, &c. All the children were living at the date of the will.

Under the description of ‘children’ in a will, illegitimate children, existing at the date of the will, not entitled, unless proved by the will itself to be intended; and evidence can be received only for the purpose of collecting, who had acquired the reputation of children. An only legitimate son therefore held entitled as devisee.

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**MACKINTOSH v. TOWNSEND.**

16 Vesey Jun. 330.

“**WILLIAM MACKINTOSH**, by his will, dated 5th April, 1797, amongst other things, directed that the interest of 5000*l.* should be invested, in trust, with the magistrates of Inverness for the time being, and that the interest of such

Legacy to be laid out in land in Scotland, established not being

within the  
statute, 9  
Geo. 2. c.  
36.

sum should be appropriated for the education of five boys, in succession, to be selected from the descendants of different families named; and the said sum of 5000*l.*, as soon as might be expedient, was to be invested in lands, in the country.

“By a codicil, dated April, 1798, at sea, the testator gave some directions in the selection of boys for education, as to the preference of the families.

“By another codicil, dated in London, June 10, 1800, he gave 5000*l.* ‘in trust with the magistrates of Inverness, added to the 5000*l.* in the first part of his will, intended there for the education of certain boys, the interest of which two sums, making in all 10,000*l.*,’ he directed to be paid to Mrs. Rae, during her natural life, and ‘after her decease, that sum was to be vested in lands, for the education of boys, as above.’ He then directed, that the interest of whatever sums of money might appear above the legacies, should be appropriated to the education of boys, during the life of Mrs. Rae, directing the 10,000*l.*, after her death, to be finally, and for ever secured on lands, for the education of boys, as formerly directed.

“By two other codicils, the testator revoked the bequest, in favour of Mrs. Rae, and directed that the 10,000*l.* should, immediately upon his own death; be appropriated for the education of boys, as before described; and he appointed the plaintiff his residuary legatee.

“The LORD CHANCELLOR, in delivering his judgment on this case, observed, that upon examining the case of *Oliphant v. Hendrie*\*, in the register book, there appeared to be nothing special in it. The testator gave a sum of money, to be laid out in heritable securities in Scotland, for charitable purposes; and Lord Thurlow’s decree was, that the legacy was good. This was a direct decision upon the point, and if he had more doubt upon it that authority bound him to determine that this was a good bequest.”

\* 1 Bro. C. C. 571.

## BRODIE v. BARRY.

Vesey and Beames, vol. 2. p. 127.

“ ALEXANDER BRODIE by his will, dated the 9th of August, 1810, duly attested for devising freehold estates, devised and bequeathed to trustees, their heirs, executors, &c. all his freehold, leasehold, copyhold, and other estates, whatever and wheresoever situate, in England, Scotland and elsewhere, and all his personal estate whatsoever and wheresoever, upon trust to carry on his works for three years; and out of the produce, dividends and interest, as well as the rents of his estates, in the first place to pay salaries to the managers of his works, and the surplus to divide equally among his nephews and nieces, who should be living at the time of his decease, share and share alike; and at the expiration of the said term of three years, to sell and dispose of all his freehold and copyhold messuages, &c.; and the money to arise from such sale to form a distributable fund, and be payable, as after-mentioned in any codicil: and as to all the residue of his estate, not consisting in money, upon trust to consolidate it into one gross sum, and subject to, and in default of appointment, to pay it equally among all his nephews and nieces, share and share alike; as to the shares of three nieces, being married, for their separate use for life, with remainder to their respective children, and for want of children to sink into the residue.

Heir at law of heritable property in Scotland, being a legatee of personal property in England, put to election. Being a married woman, the interest of her husband, by his marital right not affected.

“ The testator died on the 6th of January, 1811, without issue, not having made any appointment, and leaving the defendant, Charles Brodie, his grand-nephew, heir at law, and customary heir by the law of England, and the defendant,

Betty Cock, one of his married nieces, mentioned in the will heiress by the law of Scotland, of all his heritable property in that country. The bill was filed by his other surviving nephews and nieces, submitting, that though the testator intended to dispose of all his real estate in Scotland, and all such his estate there as by the law of that country descends to the heir, comprised under the description of heritable property, yet the will not being conformable to the solemnities required by the law of Scotland, and therefore not passing such real estate and heritable property, the defendant, Betty Cock, ought not to be permitted to take such heritable property, in opposition to the will, and also a share of the other real and personal estate, as one of the nieces of the testator, but ought to be put to her election, and praying, that she may be decreed to elect accordingly.

“ The answers submitted, whether the defendants, Brodie and Cock, ought to be put to their election; and as to the defendant David Cock, taking no interest under the will, the property being given to the separate use of his wife, whether he could be called upon to make such election as to the estate for life, to which he is entitled by the law of Scotland in the heritable property, descending in his wife.

“ THE MASTER OF THE ROLLS.

As to the reason of the distinction between conditions implied and expressed, with reference to election, as applied to freehold and copyhold estates against the heir, *quære*.

“ If it were now necessary to discuss the principles upon which the doctrine of election depends, it might be difficult to reconcile to those principles, or to each other, some of the decisions which have taken place on this subject. I do not understand why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition concerning real estate, annexed to a gift of personal property, as it is admitted it must be read when such condition is expressly annexed to such gift\*. For, if by a sound construction such condition is rightly inferred from the whole instrument, the effect seems to be the same as if it were expressed in words. And then if it be rightly decided, that a will defectively executed,

\* Boughton v. Boughton, 2 Vez. 12.    Sheddon v. Goodrich, 8 Vez. 481.

is not to be read against the freehold heir, I have been sometimes inclined to doubt whether any will ought to be read against the copyhold heir; a will, however executed, being as inoperative for the conveyance of copyhold estate, as a will defectively executed is for the conveyance of freehold estate.

“ It is true, however, that a court of equity does for certain specified purposes look at a will of copyhold estate, to discover the intention, and will supply the want of a surrender, in order to effectuate the intention so discovered, but has never attempted to supply the want of the statutory formalities in the execution of a will of freehold estate. We cannot therefore reason conclusively from the one case to the other. But whatever may be the foundation of the distinction, it is established; and what is now to be considered is, whether it be applicable to the decision of the case now before the court.

*Distinction as to supplying the want of surrender in certain cases to support a devise of copyhold estate, and refusing to aid a defective execution of a devise of freehold.*

“ This is, or is not, a case of election according as the English will is, or is not to be read against the Scotch heir. Where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine what portion of each law is to enter into the decision of the question. It is not easy to say how much is to be considered as depending on the law of real property, which must be taken from the country where the land lies, and how much upon the law of personal property, which must be taken from the country of the domicil, and to blend both together, so as to form a rule, applicable to the mixed question, which neither law separately furnishes sufficient materials to decide.

*Real property regulated by the law of the country where the land lies: personal property by that of the domicil.*

“ I have argued in the House of Lords cases in which difficulties of that kind occurred. Two of the most remarkable were those of *Balfour v. Scott*<sup>\*</sup>, and *Drummond v. Drummond*. In the former a person domiciled in England, died intestate, leaving real estates in Scotland. The heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected, that by the law of Scotland, the heir cannot share in the personal pro-

*Intestate domiciled in England, leaving real estate in Scotland, the heir being one of the next of kin, entitled to share according to the law of England,*

<sup>\*</sup> Stated in *Somerville v. Lord Somerville*, 5 Vez. 750.

not subject to the condition of collating the real estate, according to the law of Scotland.

Intestate, domiciled in England, having real estate in Scotland, the real estate charged with a heritable bond, as the primary fund, according to the law of Scotland; and not exonerated by the personal estate, according to the law of England.

Question, whether an instrument of any given nature or form is to be read against an heir, for the purpose of election, as belonging to the law of real property, de-

perty with the other next of kin, except on condition of collating the real estate, that is, bringing it into a mass with the personal estate, to form one common subject of division\*. It was determined however, that he was entitled to take his share without complying with that obligation. There the English law decided the question.

“ In *Drummond v. Drummond*, a person domiciled in England, had real estate in Scotland; upon which he granted a heritable bond<sup>a</sup>, to secure a debt contracted in England. He died intestate, and the question was, by which of the estates this debt was to be borne. It was clear, that by the English law the personal estate was the primary fund for the payment of debts. It was equally clear, that by the law of Scotland the real estate was the primary fund for the payment of the heritable bond. Here was a direct *conflictus legum*. It was said for the heir, that the personal estate must be distributed according to the law of England, and must bear all the burthens to which it is by that law subject. On the other hand it was said that the real estate must go according to the law of Scotland, and bear all the burthens to which it is by that law subject. It was determined that the law of Scotland should prevail, and that the real estate must bear the burthen.

“ In the first case the disability of the heir did not follow him to England, and the personal estate was distributed as if both the domicil and the real estate had been in England. In the second the disability to claim exoneration out of the personalty did follow him into England, and the personal estate was distributed as if both the domicil and the real estate had been in Scotland.

“ Now what law is to determine, whether an instrument of any given nature or form, is to be read against an heir at law, for the purpose of putting him to an election, by which the real estate may be affected. According to Lord Hardwicke, and the judges who have followed him, that is a ques-

\* Ersk. Inst. Law of Scotland, 701. (5th edition).

<sup>a</sup> As to the effect and nature of an heritable bond, see Bell's Commentary on the Laws of Scotland, 206. Ersk. Inst. 194, and Hope's Minor Pract. 35.

tion belonging to the law of real property, for they have decided it by a statute which regulates devises of land. Upon that principle, if the domicil were in Scotland, and the real estate in England, an English will, imperfectly executed, ought not to be read in Scotland, for the purpose of putting the heir to an election; and upon the same principle, if by the law of Scotland no will could be read against the heir, it would follow that a will of land, situated in Scotland, ought not to be read in England, to put the Scotch heir to an election.

“Doubting much the soundness of that principle, I am glad that the case of *Cunningham v. Gayner*, relieves me from the necessity of deciding the question, as whichever law is applied to the decision of the present case, the result will be the same. As to the law of England, a will of land in Scotland must be held analogous to that of copyhold estate in England, and the will is equally to be read against the heir. It was said, a will of copyhold estate may have some effect here upon the copyhold: that is, if there is a previous surrender; but then the estate does not pass by the will, which operates only as a declaration of the use. In that respect there is no difference between a copyhold and land in Scotland; for if in Scotland there be a conveyance previously executed, according to the proper feudal forms, the party may by will declare the use and trust to which it shall enure. If the law of Scotland is resorted to as the rule, the case alluded to determines that the English will may be read against the Scotch heir, for the purpose of putting him to an election; that too in the strongest case that could occur, for the will is stated to have been made on death-bed: liable therefore to the double objection; first, that a will cannot affect land; and secondly, that on death-bed no valid conveyance whatever could have been made; yet it was held, that as the heir took benefits under that will, it was not competent to him to dispute any part of its operation.

“Upon the whole, therefore, the heir must make his election. The marital rights of the husband, who derives no benefit from that will, cannot be affected by that election.”

terminated by the statute, regulating devises of land.

Effect of that, where the land is in Scotland and where the domicil is in Scotland, the estate in England, and an English will imperfectly executed. As to the soundness of the principle, *quære*.

Analogy between a devise in Scotland, and a devise of copyhold in England; the will operates as a declaration of the use of a previous surrender, in the latter case, and of a previous conveyance, according to the proper feudal form, in the former. Election against a Scotch heir, claiming under an English will, not controuled by the law of death-bed.



A will  
destroyed  
or sup-  
pressed,  
how esta-  
blished.

**WHERE** a will is suppressed or destroyed, relief may be had, if the property is real estate, in the Court of Chancery ; and if personal estate, in the Ecclesiastical Court ; but proof must be exhibited of the existence and contents of the will. The substance and effect however, under such circumstances, are usually all that can be expected to be proved ; and where this is done, the will so withheld or destroyed will be established according to the effect substantiated in evidence. A very recent case\* at the Commons, was decided upon this ground. The testator made his will in August, 1813, and bequeathed his property to two of his illegitimate children, and appointed D. their guardian, and his own trustee and executor. The testator died in January 1814 ; D. went the morning after his decease to his house, and finding there the brother of the deceased, read the will to him. The brother being angry at finding that nothing was left to him, snatched the will out of D.'s hand, and destroyed it. The paper propounded, was an affidavit, purporting to contain the substance of the will.

The Court, after hearing the evidence read, was of opinion that the facts of the case were fully proved, and pronounced for the substance of the will, as contained in the affidavit.

\* *Hendy v. Hendy*, Prerog. Court, 8th of February, 1815.

**FINIS.**

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\* The word 'equitable' stands in the margin of page 44, by mistake for 'customary.'

† For 'issue,' read 'heirs,' in the margin of page 537.

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